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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1224~~ 730 762

HENRY B. MORROW, TRUSTEE, AND W. W. REDMAN, CONSTABLE, OF DAVIDSON COUNTY, TENNESSEE, APPELLANTS,

vs.

THE CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED JULY 17, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 17, 1890.

1 The Circuit Court of the United States for the Middle District of Tennessee.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY
vs.
H. B. MORROW, Trustee of Davidson County, Tennessee, and W. W. REDBURN, a Constable of said County and State.
No. 2788. In Equity.

The following bill was filed, to wit:

To the honorable the judges of the circuit court of the United States for the middle district of Tennessee, held at Nashville:

The bill of complaint of the Cumberland Telephone & Telegraph Company, a corporation organized and existing under the laws of the State of Kentucky, and having its chief office in the city of Henderson, in said State, complainant, against Henry B. Morrow, trustee of Davidson county, Tennessee, and W. W. Redburn, a constable of said county, residents and citizens of Davidson county, in the middle district of Tennessee, defendants.

Your orator, the Cumberland Telephone & Telegraph Company, respectfully represents and says that it is an incorporated company, having its chief place of business in the State of Kentucky and organized and existing under and by virtue of the laws of and being a citizen of said State. The defendants above named are both residents and citizens of Davidson county, Tennessee.

Your orator was incorporated for the purpose of and has authority to engage in the business of telephony, or transmitting verbal messages or communications for the public by means of metallic wires commonly supported by poles like telegraph poles, electrical currents, and mechanical inventions adapted to the purpose, the result being that persons separated even by the greatest distances can audibly converse with one another. The general system used by your orator is substantially this: A plant or system is established in cities and towns, so arranged that the citizens of that town or place who are patrons of the company can communicate with each other. These local plants are then connected with others of like character at other towns or cities by means of one or more wires, as the volume of business may require, and so on still with other plants
2 further on, whereby the general public, for a compensation, can converse and communicate from town to town and place to place. Your orator has numerous plants and local systems in the States of Kentucky, Tennessee, Alabama, Indiana, and Mississippi, most of them being in Kentucky and Tennessee. While all are not connected in one general system, many of these plants are so connected as to allow of communication from one with the other.

Your orator has a large and valuable plant at Nashville, Davidson county, Tennessee, with numerous connections with other towns and places in Tennessee and Kentucky, all of which are in daily and constant use. This plant at Nashville consists of the exchange

board, wires and poles, and telephone boxes; but the most valuable part of the mechanical contrivance used with these boxes is the property of the American Bell Telephone Company, and only leased to your orator. Your orator has permission by law, State and municipal, to maintain and operate its plant and conduct its business in Nashville and Davidson county, Tennessee, and it now is and for many years has been engaged in the said business at Nashville and in Davidson county, in said State, the volume of its business being large and important at this point.

The capital stock of your orator company consists of 11,485 shares, of the par value of one hundred dollars each, and aggregating $1,148,000.00, and these shares are held and owned by citizens of Kentucky and other States.

Your orator has never been chartered by the State of Tennessee, neither has it organized under the laws of that State, nor has it ever assumed to do, nor has it done business in Tennessee in any other capacity than as a corporation and citizen of the State of Kentucky.

While so engaged in business at Nashville during the year 1888 all the property of your orator company situated in Davidson county, consisting of poles, wires, instruments, etc., and all personal property, was assessed for taxation for the year 1888, for State and county purposes, by the assessor of said county, an officer to
3 whom the assessment of such property is committed by law.

The board of equalizers, a board of officers for said county whose duty it is to equalize assessments, assumed to and did, at their meeting in June, 1888, assess said shares of stock for taxation and cause the same to be entered upon the tax books for taxation for said State and county purposes for the year 1888, and to be assessed to and against your orator for taxation and payment as the party bound therefor to the State and county. The form of the assessment is substantially as follows:

"Cum. Tel. & Tel. Co., personalty, $7,000.00	$52 50
" " " " shareholders, $689,100.00	5,168 25

Your orator, having no notice of what the board of equalization had done or was proposing to do, did not know of said assessment until long after said board of equalization had adjourned and all its powers were exhausted and ended.

The tax so assessed was—

Company property, $7,000	$52 50
Stockholders Cum. Tel. & Tel. Co.	5,168 25

Your orator paid all said property tax January 30th, 1889, but refused to and did not pay said tax of $5,168.25, assessed and levied as aforesaid. It is assessed in gross to the Cumberland Telephone & Telegraph Company "stockholders" and not to and against each shareholder according to his holding, as should be done in cases when stock or shares of the stock of incorporated companies is rightly taxed by and in the State of Tennessee. Said tax books came into the hands of Henry B. Morrow, defendant, the trustee

for said county — Davidson, and the said tax not having been paid, on the 15th day of April, 1889, he caused to be made out and issued to and placed in the hands of the defendant Redmond, heretofore named a duly "certified list" of the delinquent taxes for said year, which included said tax of $5,168.25 above mentioned. The defendant Redmond is a constable for the district of or ward of Nash-
4 ville, wherein your orator's place of business is situate, or is a special deputy for the collection of said list appointed by said Morrow, trustee.

This "certified list" under the laws of Tennessee (1887, ch. 2, 58) has the force and effect, by the express language of the statute, of an "execution from a court of record," and is authority for the said defendant, to whom it is issued, to levy upon and sell and distrain any of the property of your orator aforementioned in Davidson county for the payment of said tax, commissions, and costs. Said "certified list" or warrant is and was issued to the defendant Redmond as an officer aforesaid to be executed not against the property of any resident stockholder of Tennessee, if any such there be, for the tax assessed against him, but upon and against your orator, as stated hereinbefore; and in pursuance thereof the said defendant has levied upon the property, poles, wires, instruments, and plant of your orator in Nashville, and unless restrained by your honors will proceed in a few days to sell the said property of your orator in Davidson county for the satisfaction thereof; and now your orator further shows and says that said assessment and taxation is illegal and unjust and void.

Your orator company is a corporation and citizen of Kentucky, having its chief office in said State and merely doing business in Tennessee; wherefore it is advised and thereupon shows and says that the said shares of its stock are not liable to be taxed and cannot be taxed in and by the State of Tennessee; and it also further shows and says that even if any shares which are held by residents of Tennessee, if any such there be, are taxable in Tennessee to such holders respectively, the said tax so assessable and assessed cannot be collected of and enforced against your orator company because it is not and cannot be bound for or obliged to pay or collect and pay any part thereof. Your orator is advised that by the laws of Tennessee corporations which were chartered by that State or the United States and which have their chief office in Tennessee
5 may be obliged and required to retain out of any dividends payable to any stockholder the tax assessed against him upon his stock; but your orator was not chartered or created in Tennessee or by the United States, but by the State of Kentucky, and also has its chief office in said last-mentioned State.

Not only will your orator be obliged to pay said large sum of money, no part of which is rightly or justly due from it, if said defendant is allowed to proceed unrestrained, to the great wrong and injury of your complainant, but irreparable injury and wrong will be done to your orator and suffered by it, in this: Said property is of a very peculiar value, and its chief value consists in the business done; that its business will be suspended and injured in a way not

capable of being estimated if the central "exchange board" or instruments or wires be seized by said defendant and the business be suspended or will be if he distrain. Moreover, the public will be irreparably injured as well. Many merchants, manufacturers, and business men of Nashville use your orator's property and rely thereon in and for the carrying on of their business, and they will not only be greatly annoyed, but seriously interrupted and damaged by a seizure of your orator's property and a closing up of the business upon which, as stated, they are now obliged to and do rely.

And your orator says that this interruption and suspension of business will also subject your orator to numerous damage suits on the part of its patrons and subscribers and put it to great trouble and expense to defend the same, and also if it be made to pay said tax the holders of shares of said stock who reside in other States and have never been citizens of Tennessee will subject your orator to numerous and expensive suits if it pays the same and assumes to and does retain the same out of the dividends payable upon the said shares for its indemnity and reimbursement, as it will be obliged to do.

The premises considered, your orator prays for leave to file this bill against the said Morrow, trustee, and the said Redmond,
6 constable, as defendants hereto; that the process of subpœna and all other necessary processes issue to them as such, commanding them by a day certain to be named therein to appear and defend and answer each and every the allegations hereof, an answer on oath being waived. Complainant prays that in the meantime the writ of injunction issue out of this honorable court to the said defendant Redmond, enjoining and restraining him from levying upon or seizing and from attempting to levy upon or seize or distrain any of the property of your orator under and by virtue of said "certified list" or any distress warrant for said taxes, and from levying on or seizing or distraining the same or any part thereof for the payment of any or satisfaction of the taxes aforesaid or any part thereof, and restraining and enjoining said Morrow, trustee, from proceeding further in the enforcement of said alleged tax. Complainant prays that on final hearing said injunction be made perpetual, and also for a decree for all other, further, and general relief as the nature of the case may demand and as your orator may be entitled to receive. As in duty bound, it will ever pray. This is the first application for the writ of injunction in this case.

VERTREES & VERTREES,
HILL & GRANBERY,
Solicitors for Complainant.

The following affidavit appears on said bill of complaint:

I, W. E. Eastman, do make oath and say that I am the general manager at Nashville, Tennessee, of the complainant, The Cumberland Telephone & Telegraph Company, and that the allegations of the foregoing bill are true in substance and in fact to the best of my knowledge, information, and belief.

W. E. EASTMAN.

Sworn to and subscribed before me this April 16th, 1889.
[NOTARIAL SEAL.] LEN. K. HOOD,
Notary Public.

The bill is endorsed: "Filed April 20th, 1889. H. M. Doak, clerk."

The following summons was issued, to wit:

The President of the United States of America to the marshal of the middle district of Tennessee, Greeting:

You are hereby commanded to summon H. B. Morrow, trustee of Davidson county, State of Tennessee, and W. W. Redburn, a constable of said county and State, and residents and citizens of said State and of the middle district thereof, if to be found in your district, to be and appear at the Federal court room, in the custom-house, in Nashville, Tennessee, on the third Monday in April, 1889, before the judges of the circuit court of the United States for the middle district of Tennessee, to answer the bill of complaint against them, on the equity side of the docket, praying for writ of injunction, etc., of the Cumberland Telephone & Telegraph Company, a citizen of the State of Kentucky and a corporation organized under the laws of said State; and herein fail not, and have you then and there this writ.

7

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 20th day of April, 1889, and of American Independence the one hundred and thirteenth year.

[Seal of the Circuit Court.]

H. M. DOAK, *Clerk.*

MEMORANDUM.—The defendants will enter their appearance herein and plead, answer, or demur on or before the first Monday in June, 1889, or the bill will be taken for confessed against them and set down for hearing *ex parte.*

H. M. DOAK, *Clerk.*

Endorsed: Issued April 20th, 1889. H. M. Doak, clerk.

Further endorsed: Came to hand same day issued and executed by making known the contents hereof to H. B. Morrow, trustee, and W. W. Redburn and leaving with them a copy of the bill. April 20th, 1889. S. F. Wilson, U. S. marshal.

The following restraining order was issued:

The President of the United States to the marshal of the middle district of Tennessee, Greeting:

You are hereby commanded to make known unto H. B. Morrow, trustee of Davidson county, State of Tennessee, and to W. W. Redmond, a constable of said county and State, the following order, made by the honorable the circuit court of the United States for the middle district of Tennessee, at the April term, 1889, in the cause of the Cumberland Telephone & Telegraph Company against H. B. Morrow, trustee, *et al.*, to wit:

8 "Be it remembered that this cause came on to be heard April 22nd, 1889, before the Hon. Howell E. Jackson, judge, etc., upon the motion of the complainant for a temporary injunction against defendants, restraining them from in any way interfering with the property of complainants, and especially from proceeding to sell the property already levied on belonging to complainant and from attempting to levy upon other property of complainant, and from attempting to collect or proceeding to collect the tax of $5,168.25, assessed against complainant, and enjoining the defendants from doing or attempting to do the things or acts complained of in the bill; and, upon consideration of said motion, the same is allowed, and the clerk of this court is directed and ordered to issue to the defendants writs of injunction in accordance with the above motion; and it is further ordered that this writ of injunction remain in force until further orders from this court."

And you will enjoin defendants, H. B. Morrow, trustee, and W. W. Redmond, constable, of the aforesaid county, to render due obedience to said order, and you will due and proper return make hereof.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 23d day of April, 1889, and of American Independence the 113th year.

H. M. DOAK, *Clerk.*

Endorsed: Issued April 23d, 1889. H. M. Doak, clerk.

And further endorsed: Received April 23d, 1889, and executed, as required by law, same day on H. B. Morrow, trustee, and W. W. Redburn, constable. S. F. Wilson, U. S. marshal.

The following answer was filed, to wit:

The Answer of H. B. Morrow and W. W. Redburn to the Bill Filed against Them in the Above-Entitled Cause.

Respondents, for answer, say they cannot admit that the complainant was organized under the laws of Kentucky, and demand proof of such incorporation. Respondents deny that complainant's chief place of business is in Kentucky. Its chief place of business is in Nashville, Tennessee, where reside its principal officers, including the president and secretary and general manager

9 and, as respondents are informed, a majority of its board of directors. A large number of the shareholders of complainant live in Tennessee, but as to the amount of stock owned by said resident shareholders respondent cannot state. They file herewith, as Exhibit "A" to this answer, a list of complainant's shareholders who were residents of the State on January 10th, 1888.

Respondents cannot state the amount of stock owned by the parties set forth in said exhibit, but will produce at the hearing testimony as to such amounts so held. The statements in the bill as to the purposes of complainant's incorporation are not known to these respondents to be true and cannot be admitted; nor have respondents any knowledge as to the number of plants owned and operated by complainant, nor the location of such plants. Respondents admit

that complainant has a plant at Nashville, as stated in the bill, but which is the most valuable part of said mechanical contrivances and to whom it belongs respondents do not know. Respondents admit that complainant has permission by State and municipal law to conduct its business in Nashville and Davidson county, and that it has been engaged in said business for many years. Respondents admit that the capital stock of complainant is $1,148,000, as stated in the bill. Respondents admit that complainant has never been chartered by the State of Tennessee, but respondents insist that complainant is organized under the laws of Tennessee. Respondents admit the assessment of complainant's property as stated in the bill, but whether complainant had or had not notice of the action of the board of equalization respondents cannot state.

Respondents admit that complainant paid the property tax but refused to pay the $5,168.25, as stated in the bill.

Respondents admit that said tax books came into the hands of respondent, H. B. Morrow, as trustee for Davidson county, and that he issued and placed in the hands of W. W. Redmond, a constable for — of Davidson county, a certified list of the delinquent taxes, including said tax of $5,168.25, and that respondent Redmond, as stated in the bill, has levied upon complainant's property and would have sold the same had not the injunction been issued in this case. Respondents deny that said assessment is illegal, unjust, and void. Respondents deny that respondents' action will subject complainant to irreparable injury and wrong, for the complainant can under the laws of the State pay the tax and sue the officer for its recovery. And now, having fully answered, respondents pray to be hence dismissed, etc.

PITTS & MEEKS AND
SAM. WATSON,
Solicitors for Defendants.

Personally appeared before me, the undersigned, H. B. Morrow and W. W. Redmond and made oath that the facts stated in the above answer are true to the best of their knowledge, information, and belief.

E. L. GREGORY,
U. S. Comm'r.

[NOTARIAL SEAL.]
Nashville, Dec'r 17th, 1889.

H. B. MORROW,
Trust., D. C.
W. W. REDMAN, *C., D. C.*

Endorsed: Filed Dec. 18th, 1889. H. M. Doak, clerk.

At the October term, 1889, the following action was had:

This cause came on to be heard on this the 31st day of October, 1889, upon the motion of the defendants to dismiss complainant's bill upon the following grounds:

Defendants, H. B. Morrow and W. W. Redburn, by Steger and Washington, solicitors, and S. Watson and Pitts & Meek, solicitors

for the State of Tennessee, move the court to discharge the preliminary injunction and dismiss the bill herein in so far as the same seeks to enjoin and restrain defendants, as trustee and constable of Davidson county, from collecting the State taxes for the year 1888, complained of in the bill, upon the following grounds:

1. Said suit as to the State taxes is in effect a suit against the State, and for which the State has given no permission.

2. It is a suit against officers of the State, acting by authority
11 of the State, with a view to reach and does reach the treasury and affect the treasury and funds of the State, and is expressly forbidden by statutes of said State—Acts 1873, chap. 13.

3. The bill seeks to and the injunction does enjoin said officers from collecting taxes assessed against the complainant and claimed to be due the State for the year 1888, and such and all similar proceedings are expressly forbidden by the statute of said State—Acts 1873, chap. 44, secs. 1, 2.

S. WATSON,
PITTS & MEEKS,
Solicitors for the State.
STEGER & WASHINGTON, *Solicitors.*

Upon consideration thereof the said motion is overruled. The defendants are given until the 30th day of November, 1889, to answer the bill.

On the 26th day of April, 1890, the following deposition of W. E. Eastman was filed:

The deposition of W. E. Eastman, taken by consent, January 21st, 1890, by Vertrees & Vertrees, solicitors.

Said witness, W. E. EASTMAN, being first duly sworn, deposed as follows:

Question 1. State your age and residence.

Answer. 43 years; Nashville, Tennessee.

Question 2. What connection have you with the complainant company?

Answer. General manager.

Question 3. How long have you been general manager?

Ans. Since May, 1889.

Question 4. By and in what State was the complainant organized and chartered, and have you copies of the company's articles of incorporation?

Ans. In the State of Kentucky, and I herewith file as exhibits to to my deposition certified copies of the charter and all amendments, marked Exhibits Nos. 1, 2, 3, & 4.

Question 5. Where is the company's chief office?

Ans. Henderson, Kentucky.

12 Question 6. What does the company keep there?

Ans. Records and books.

Question 7. Where are the stockholders' meetings held?

Ans. In the company's office at Henderson, Kentucky.

Question 8. Was there ever a stockholders' meeting held anywhere else, particularly in the State of Tennessee?

Ans. None since my connection with the company. In various capacities I have been with the company since September, 1888, and, so far as I am informed, there never has been any held elsewhere.

Question 9. Where does the company hold its directors' meetings?

Ans. At Henderson, Kentucky, and at Nashville, Tennessee; mostly at Nashville, Tennessee.

Question 10. In what States do your directors reside?

Ans. Massachusetts, District of Columbia, Indiana, and Tennessee; a majority reside in Tennessee.

Question 11. Has any charter or amendment to the charter ever been granted or taken out in Tennessee by or for the complainant company?

Ans. No, sir.

Question 12. Under what charter was the company organized and under what charter is it operating?

Ans. Under the charter copies of which I have exhibited.

Question 13. How many exchanges or local plants has the company in Tennessee and how many had it in 1888?

Ans. Nine; Nashville and Memphis being the largest and about the same.

Quest. 14. In how many and what States has the company plants or exchanges or stations?

Ans. In five—Indiana, Illinois, Kentucky, Tennessee, and Mississippi.

Quest. 15. Which is your largest exchange?

Ans. Nashville and Memphis; Nashville being a little larger—that is, having a few more instruments than Memphis.

13 Quest. 16. Is there any other exchange or plant in Davidson county than at Nashville?

Ans. No, sir.

Quest —. Who own the telephones used by your company and who owned them in 1887 and 1888?

Ans. They are owned by the American Bell Telephone Company of Boston, Massachusetts, and leased by us at a monthly rental. That company will not sell them to any one, but only leases them.

Question 18. State the nature of your business, and whether or not a seizure or sale of the company's property would result in serious injury to it.

Ans. It would be serious and the interference would be as described in the bill which was sworn to by me and to which I here refer.

W. E. EASTMAN.

The following cross-interrogatories were put by defendant and answered by the witness:

Question 1. How many meetings of the stockholders of the complainant have you attended?

Ans. None.

Question 2. How do you know that all the meetings of said company's stockholders have been held at Henderson, Kentucky?

Ans. From the records.

Question 3. Please examine the exhibit to the answer and state if this is not a correct list of the stockholders of said company resident in Tennessee on January 10th, 1888.

Ans. It is not.

Question 4. What was the aggregate amount of the stock owned by residents of Tennessee on January 10th, 1888?

Ans. I decline to answer, it being the private business of the company and it being, as we are advised, under no obligation
14 to reveal the fact to any one.

Question 5. What was the aggregate amount of stock owned by residents of Kentucky at same date?

Ans. I decline to answer, it being a private business of the company and it being, as we are advised, under no obligation to reveal this fact to any one.

Quest. 6. Give the places of residence of the original incorporators of the complainant company.

Ans. E. S. Babcock, Jr., Evansville, Indiana; H. G. Kellogg, Chicago, Ill.; F. P. Huston, Evansville, Ind.; F. T. Baker, Evansville, Ind.; Paul J. Marrs, Henderson, Ky.; E. P. Copeland, Chariton, Iowa; J. Compton, Nashville, Tenn.; B. S. Rhea & Son, Nashville, Tenn.; E. M. Barton, Chicago, Ill.

Quest. 7. Please give the names, places of residence, and dates of election of the directors and officers of the company from its organization to the present time.

Ans. June 8th, 1883, first election of directors, M. G. Kellogg, of Chicago, Ill.; E. P. Huston, of Evansville, Ind., and J. Compton, of Nashville, Tenn., were elected to serve one year. E. M. Barton, of Chicago, Ill.; E. P. Copeland, of Chariton, Iowa, and I. T. Rhea, of Nashville, Tenn., were elected to serve two oears. Paul J. Marrs, of Henderson, Ky.; E. S. Babcock, Jr., of Evansville, Ind., and E. T. Baker, of Evansville, were elected to serve three years.

Officers elected were E. S. Babcock, Jr., president; P. J. Marrs, vice-president and general manager, and E. T. Baker, secretary and treasurer.

November 26th, 1883, E. P. Copeland resigned from the board of directors and Geo. R. Knox, of Nashville, Tenn., elected to fill the vacancy.

May 13, 1884, E. P. Huston, of Evansville, Ind.; W. M. Duncan and J. Compton, of Nashville, Tenn., elected directors. E. M. Barton resigned and M. G. Kellogg, of Chicago, Ill., elected to fill vacancy. Same officers re-elected.

15 April 24th, 1885, E. T. Baker resigned as secretary and treasurer and John Lenihan, Jr., of Nashville, Tenn., elected to fill vacancy.

May 12, 1885, I. T. Rhea, E. W. Cole, and O. F. Noel, of Nashville, Tenn., elected directors; E. T. Baker resigned as director, and James E. Caldwell, of Nashville, Tenn., elected to fill vacancy.

May 16, 1885, election of officers: O. F. Noel, of Nashville, Tenn.,

president; E. S. Babcock, Jr., of San Diego, Cal., vice-president; John Lenihan, Jr., of Nashville, Tenn., secretary; P. J. Marrs, assistant secretary at Henderson, Ky.; Geo. L. Masters, of Evansville, Ind., acting general manager, and Gilbert Parkes, of Nashville, Tennessee, treasurer.

July 25, 1885, Geo. L. Masters, acting general manager, resigned and O. F. Noel elected general manager.

Sept. 1, 1885, Gilbert J. Parkes, treasurer, resigned, and H. A. Myers, Nashville, Tenn., elected to fill vacancy.

March 16, 1886, H. A. Myers, treasurer, resigned; Leland Hume, of Nashville, Tenn., elected to fill vacancy.

May 11, 1886, Jos. H. Thompson, J. H. Fall, and Jas. E. Caldwell, of Nashville, Tenn, elected directors.

May 14, 1886, same officers re-elected, except that Miss Ida May Toon was elected assistant secretary at Henderson, Ky., in place of P. J. Marrs, resigned.

May 22, 1886, Isaac T. Rhea, of Nashville, Tenn., elected vice-president.

May 10th, 1887, E. P. Huston, of Evansville, Ind., and W. M. Duncan and J. Compton, of Nashville, Tenn., elected directors and Wm. Litterer, of Nashville, Tenn., elected to fill vacancy occasioned by resignation of Jos. H. Thompson.

May 13, 1887, same officers re-elected.

May 10, 1888, E. W. Cole, I. T. Rhea, and O. F. Noel elected directors.

May 18, 1888, same officers re-elected, except Mrs. S. A. Alexander, of Nashville, Tenn., elected treasurer in place of Leland Hume.

Sept. 13, 1888, E. W. Cole and Jas. E. Caldwell resigned as
16 directors and Sparrel Hill and Jas. A. Pigue elected to fill vacancies.

Sept. 19, 1888, Henry Sperry, of Nashville, Tenn., elected to fill vacancy occasioned by resignation of Jas. Compton.

Sept. 25, 1888, W. M. Duncan, of Nashville, Tenn., elected president to fill vacancy occasioned by resignation of O. F. Noel, and Jos. H. Thompson, of Nashville, Tenn., elected to fill vacancy on the board of directors occasioned by resignation of O. F. Noel.

Nov. 21, 1888, Jos. M. Brown, of Washington, D. C., elected a director to fill vacancy occasioned by resignation of J. H. Fall.

May 14, 1889, Wm. Litterer and Jas. A. Pigue, of Nashville, Tenn., and Jos. M. Brown, of Washington, D. C., were re-elected directors; L. F. Benson, of Nashville, Tenn., was elected to fill a vacancy of I. T. Rhea, resigned; board increased from nine to twelve members; W. N. Johns, of Nashville, Tenn.; E. W. Cook, of Evansville, Ind., and John F. Hudson, of Boston, Mass., elected directors.

The directors elected same officers for ensuing year, exeept that they elected Jos. H. Thompson vice-president in place of I. T. Rhea, resigned.

May 15, 1889, W. E. Eastman was elected general manager.

Oct. 3, 1889, Sam. Myer, of Henderson, Ky., was elected assist-

ant secretary in place of Mrs. H. C. Weaver (formerly Miss Ida May Toon).

Nov. 14, 1889, Mr. J. H. Collins, of Nashville, Tenn., elected a director to fill vacancy occasioned by the death of L. F. Benson, and J. H. Collins elected president in place of W. M. Duncan, resigned; W. M. Duncan elected vice-president in place of Jos. H. Thompson, resigned.

Question 8. State how many meetings of the board of directors have been held in Henderson, Ky., and the dates of such meetings.

Ans. May 14, 1889. Frequently met at Henderson, but, for want of a quorum, adjourned to Nashville, Tenn.

Question 9. What books and records of the company are kept at Henderson and what books and records at Nashville?

—. Duplicate sets are kept at Henderson and Nashville.

17 Question 10. What officers of the company have resided and now reside at Henderson, and what was and is the nature of their business there?

Ans. Assistant secretary has charge of the records, books, etc., and the business generally.

Question 11. Please examine the paper here shown you and state if it is not a copy of the report made by the company's secretary to the auditor of Kentucky, showing the gross amount of the company's receipts in Kentucky, and made in accordance with the laws of Kentucky for the purposes of taxation. Please file said paper as Exhibit "A" to your deposition.

Ans. Yes.

Quest. 12. Please give the gross amount of the company's receipts in Tennessee.

Ans. $186,927.98. Our largest cities are in Tennessee.

Question 13. At what place are the shares of stock transferred on the company's books?

Ans. Henderson, Ky., and Nashville, Tenn. Duplicate sets are kept at these places and both places show all transfers.

Nashville, Tennessee, March 20th, 1890.

W. E. EASTMAN.

The following is the paper referred to as Exhibit "A" in the foregoing deposition:

STATE OF TENNESSEE, }
Davidson County. }

The affiant, John Lenihan, being duly sworn, says that he is and has been for more than three years past the secretary of the Cumberland Telephone & Telegraph Company, operating and doing business within the State of Kentucky; that as secretary of said company he is familiar with the affairs, earnings and expenses, of said company; that the gross earnings of said company in the State of Kentucky for the year beginning with the first day of July,

1887, and ending with the first day of July, 1888, were seven thousand nine hundred and fifty-nine dollars and nine cents ($7,959.09).

JOHN LENIHAN.

18 Subscribed and sworn to before me, the undersigned notary public, this 15th day of November, 1888.

[SEAL.] H. L. CLAIBORNE,
Notary Public.

A true copy.
Attest: L. C. NORMAN, *Auditor.*

On the 26th day of April, 1890, at the April term of the circuit court aforesaid, the following decree was entered, to wit:

This cause came on this the 26th day of April, 1890, before the Hon. Howell E. Jackson, judge, upon the motion of the defendants for a rule upon W. E. Eastman, a witness examined by the complainant, to compel him to answer cross-interrogatories Nos. four (4) and five (5), propounded by the counsel for the defendants to said witness, as shown by his deposition in open court produced and filed in the case. Upon consideration thereof the rule was refused. Thereupon the case came on to be finally heard and, upon the consideration thereof, the court is pleased to and does order, adjudge, and decree—

First. That the collection of said tax assessed against the complainant on the stock of its shareholders for the year 1888, as shown in the bill, be, and it is hereby, perpetually enjoined.

Second. That all further proceedings under and by virtue of the certified list, or distress warrant, in the pleadings mentioned be perpetually enjoined.

Third. That the defendant, Henry B. Morrow, county trustee, be perpetually enjoined from issuing any other or further certified list, or distress warrant, for said tax, costs, and penalties.

Fourth. That the defendants pay the costs of the cause, for which let *fi. fa.* issue.

And thereafter, to wit, on the 31st day of May, 1890, and at the April term also, the following agreement was filed, to wit:

In this cause, determined by decree entered at this term, from which defendants have prayed an appeal and obtained the
19 same to the Supreme Court of the United States, the complainant and appellee waives the issuance and service of a citation and agrees to enter its appearance in said cause in the Supreme Court just as if the citation prescribed by law had been regularly issued and served. It is further agreed that one of the exhibits to the deposition of W. E. Eastman was a properly certified copy of complainant's charter and amendments thereto, issued and granted under the laws of Kentucky, and that this exhibit need not be copied in the record for the Supreme Court. It is further agreed that the exhibit to the defendant's answer, purporting to be a list of stockholders in the complainant company resident in Tennessee, contains about — names, and that this exhibit need not be copied in the record for the Supreme Court. It is further agreed that this stipu-

lation may be filed in this court and made a part of the record in said cause in the Supreme Court.

Nashville, Tennessee, April 30th, 1890.

PITTS & MEEKS,
S. WATSON,
Solicitors for the Defendants and Appellants.
VERTREES & VERTREES,
HILL & GRANBERY,
Solicitors for Complainant.

Endorsed: Filed May 31st, 1890. H. M. Doak, clerk.

And on the 31st day of May, 1890, the following order was entered of record, to wit:

In this cause the defendants pray an appeal from the decree rendered against them, which appeal is granted and the amount of the penalty of the bond to be given by them is fixed at one hundred and fifty dollars.

The following bond for costs was filed:

Know all men by these presents that we, Henry B. Morrow, trustee, and W. W. Redman, are held and firmly bound unto the Cumberland Telephone & Telegraph Company in the full and just sum of one hundred and fifty dollars, to be paid to the said Cumberland Telephone & Telegraph Company, — certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of June, 1890.

Whereas lately, at a circuit court for the middle district of Tennessee, held at Nashville, in said State, for said district, in a suit depending in said court between The Cumberland Telephone & Telegraph Company and H. B. Morrow, trustee of Davidson county, Tennessee, and W. W. Redman, a constable of said county, a decree was rendred against the said H. B. Morrow, trustee, and W. W. Redman, constable, and the said H. B. Morrow, trustee, and W. W. Redman, constable, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation having been waived and the complainant and appellee having agreed to enter its appearance in the Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of this obligation is such that if the said H. B. Morrow, trustee, and W. W. Redman, constable, shall prosecute their appeal to effect and answer all damages and costs if they fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

LEON TROUSDALE, JR.
BOONE CANLLER.

Endorsed: Filed June 25th, 1890. H. M. Doak, clerk.

I certify that the foregoing is a true, perfect, and complete copy of the record in the above cause as the same is on file and of record in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the court, at my office, in Nashville, State of Tennessee, this June 25th, 1890.

[Seal Circuit Court U. S., Middle District Tenn.]

H. M. DOAK, *Clerk.*

Endorsed on cover: M. Tennessee C. C. U. S. No. 1224. Henry B. Morrow, trustee, and W. W. Redman, constable, of Davidson county, Tennessee, appellants, *vs.* The Cumberland Telephone and Telegraph Company. Filed July 17, 1890.

Circuit Court of the United States in and for the Middle District of Tennessee.

THE CUMBERLAND TELEPHONE & TELEGRAPH CO. v. H. B. MORROW, County Trustee, *et al.* } No. 2788. In Equity.

I, H. M. Doak, clerk of the above-styled court, hereby certify that in the record in this case heretofore taken to the Supreme Court of the United States by appeal the following should have been inserted as a part of the motion to dismiss the bill, viz:

4. The said act of 1873, chap. 44, sec. 1, affords complainant a complete, adequate, and unembarrassed remedy at law, by payment and suit to recover back the taxes complained of, as therein provided.

5. Independent of said statute, the complainant has a complete, adequate, and unembarrassed remedy at law by payment of taxes under protest and suit to recover back, there being no allegation of insolvency of the defendants.

PITTS & MEEKS, *Sol's.*

The above two paragraphs constitute a part of the motion to dismiss copied into the record, page 10 of the original, and page 7 of the printed record, and were omitted by mistake from the transcript because the names of solicitors signing the above paragraphs and of two other solicitors were signed at the end of paragraph 3 of the original and I, as clerk, did not observe the above paragraphs, 4 and 5, on the opposite page, signed as above.

In witness whereof I have hereunto written my name and affixed the seal of the court, at my office, in Nashville, State of Tennessee, this the 8th day of October, 1890.

[Seal Circuit Court U. S., Middle District Tenn.]

H. M. DOAK, *Clerk.*

Stipulation.

It is agreed that the above two paragraphs may be inserted as part of the record in the Supreme Court without suggestion of diminution and certiorari.

Nashville, Tenn., Oct. 9, 1890.

VIRTREY & VIRTREY,
Att'ys for Appellee.

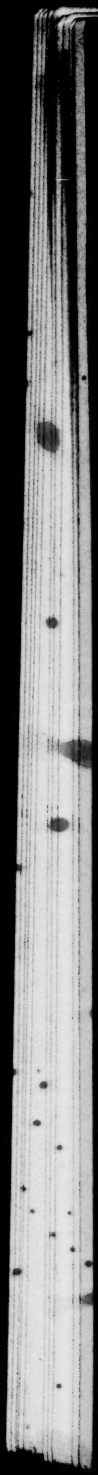
SPARREL HILL,
Sol. for Appellee.

S. WATSON,
Sol'r for Appellants.

[Endorsed:] No. 2788. The Cumberland Telephone & Telegraph Company *vs.* H. B. Morrow, trustee, *et al.* Certificate of clerk supplying omission from record. Circuit court of the United States, middle district of Tennessee.

[Endorsed:] Supreme Court U. S. 1890, October term. No. 1224. H. B. Morrow, trustee, *et al.*, app'ts, *vs.* The Cumberland Telephone & Tel'g'h Co. Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Nov. 10, 1890. James H. McKenney, clerk.



Supreme Court of the United States.

OCTOBER TERM, 1890.

NO. 1224.

HENRY B. MORROW, TRUSTEE, AND W. W. REDMAN, CONSTABLE OF DAVIDSON COUNTY, TENN.,
Appellants,

vs.

THE CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

MOTION.

The appellants, Henry B. Morrow and W. W. Redman, through their solicitor, S. Watson, and Geo. W. Pickle, the Attorney-general for the State, move the Court to advance this cause, and set it for hearing at an early day of this term.

Notice of this motion was served upon the solicitors for the appellee, as follows:

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1224.

HENRY B. MORROW, TRUSTEE, AND W. W. REDMAN, CONSTABLE OF DAVIDSON COUNTY, TENN., APPELLANTS,

vs.

THE CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

To the Cumberland Telephone and Telegraph Company:

This is to notify you that on Wednesday, October 15 next, the appellants will move to advance this cause upon the docket, and to have it set for hearing at an early date in the term.

S. WATSON,
Solicitor for the Appellants.

NASHVILLE, TENN., Oct. 8, 1890.

Service accepted this October 9, 1890.

VERTREES & VERTREES, *Att'ys.*

STATEMENT.

This is a bill filed in the United States Circuit Court by the telephone company to enjoin the collection of taxes assessed against it in favor of the State of Tennessee and the county of Davidson, amounting to the sum of $5,168.25. (*Page* 2.)

The defendants to the bill—the appellants here—are officers of the State, charged with the collection of said tax. (*Pages* 2, 3.)

The assessment was made against the telephone company upon the value of the shares of stock in said company.

The complainant, in its bill, insists that, since it was chartered by the State of Kentucky, and hence is a non-resident of Tennessee, the shares of stock are not taxable in Tennessee; and, moreover, that even if the shares owned by residents of Tennessee are taxable, the assessment should be made against the individual share-holders, and not against the corporation. (*Page* 3.)

The defendants to the bill moved to dismiss it for want of equity, because it is a suit against the State; and, further, that the complainant has a

clear and adequate remedy at law by paying the tax and suing to recover it back under the Acts of 1873, Ch. 13 and 44. (*Page* 7.)

These motions were overruled, and the defendants filed their answer. (*Page* 6.)

Upon final hearing the Court decreed in favor of the complainant, and made the injunction perpetual. (*Page* 13.)

The defendants appealed to this Court.

BRIEF.

The motion to advance is based upon Section 949 of the Revised Statutes, which is thus:

> **Where a State is a party, or the execution of the revenue laws of a State is enjoined or stayed in any suit in a Court of the United States, such State, or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient cause, to have the cause heard at any time after it is docketed in preference to any civil cause pending in such Court between private parties.**

The record in this cause shows that the defendants are State officers charged with the collection of its revenue, and that, by the decree of the Circuit Court, they are perpetually enjoined from making such collection.

It is not pretended that the laws under which the assessments were made, nor the laws authorizing the collection of the tax by the defendants, are in any respect in violation of the Constitution of the State or of the United States. The complaint amounts simply to this: that the assessors erred in making the assessment against the corporation, because it should have been made against the resident share-holders individually, if there were any such. The acts of 1873, referred to above, require

the tax to be paid into the treasury, and permit the tax-payer to sue for its recovery; they also forbid the issuance of an injunction restraining the collection of taxes.

The result of the decision of the Circuit Court in this cause is that the non-resident tax-payer may come into the Federal Courts, and secure the restraint of the process against him, and have the advantage incident to the delays of a lawsuit, whilst the resident tax-payer must first pay the tax before proceeding to test the question of his liability. It is certainly of great importance to the State to know whether there shall be one mode of procedure in case of the resident tax-payer, and another for the non-resident tax-payer. It happens that in this cause the amount is sufficient to bring the matter within the jurisdiction of this Court. But in all other cases involving less than the jurisdictional limit for appeals, the State will be subject to final decrees of perpetual injunction in the Circuit Court.

It is respectfully submitted that there is "sufficient reason," under the statute, for granting the motion to advance.

GEO. W. PICKLE,
Attorney-general for the State,
S. WATSON,
Of Counsel.

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1890.

HENRY B. MORROW, TRUSTEE, AND W. W. REDMAN, CONSTABLE OF DAVIDSON COUNTY, TENNESSEE,

vs.

THE CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

STATEMENT OF FACTS.

This suit was commenced by bill filed in the Circuit Court of the United States for the Middle District of Tennessee by the Cumberland Telephone & Telegraph Company, for the purpose of enjoining the collection of taxes assessed against said company in favor of the State of Tennessee and the county of Davidson. Upon final hearing, a decree was rendered perpetually enjoining the collection of the tax.

The defendants have appealed to this Court.

The bill alleges that the complainant was chartered and organized under the laws of Kentucky, and has its chief office at Henderson, in said State.

That the purpose of its incorporation is to engage in the business of telephoning or transmitting verbal messages or communications for the public by means of metallic wires, electrical currents, etc.

That it has numerous plants and local systems in the States of Kentucky, Tennessee, Alabama, Indiana, and Mississippi, most of them being in Kentucky and Tennessee.

That it has a large and valuable plant at Nashville, Davidson County, Tennessee, consisting of the exchange board, wires and poles, and telephone boxes; but the most valuable part of the mechanical contrivance used with these boxes is the property of the American Bell Telephone Company, and only leased to the complainant.

That it has permission by law, State and municipal, to maintain and operate its plant and conduct its business in Nashville and Davidson County, Tennessee; and it now is, and for many years has been engaged in the said business at Nashville and in Davidson County; that its capital stock consists of 11,485 shares, of the par value of one hundred dollars each, and aggregating $1,148,000, and these shares are held and owned by citizens of Kentucky and other States.

That it has never been chartered by the State of Tennessee nor organized under its laws, nor done

business in that State in any other capacity than as a corporation and citizen of the State of Kentucky.

That complainant's property in Davidson County, consisting of poles, wires, instruments, etc., and all personal property, was assessed for taxation for the year 1888, for State and county purposes, by the Assessor of said county, an officer to whom the assessment of such property is committed by law; that the Board of Equalizers, a board of officers for said county whose duty it is to equalize assessments, assumed to, and did, at their meeting in June, 1888, assess said shares of stock for taxation, and cause the same to be entered upon the tax-books for taxation for said State and county purposes for the year 1888, and to be assessed to and against the complainant as the party bound therefor to the State and county. The form of the assessment is as follows:

Cum. Tel. & Tel. Co., personalty, $7,000.00	$ 52 50
Cum. Tel. & Tel. Co., share-holders, $689,100.00	5,168 25

That the complainant, having no notice of what the Board of Equalization had done or was proposing to do, did not know of said assessment until long after the board had adjourned and all its powers were exhausted and ended.

That the complainant paid all said property tax January 30, 1889, but refused to and did not pay said tax of $5,168.25 assessed and levied as aforesaid.

That the tax-books came into the hands of the defendant Morrow, the Trustee of Davidson County, and he issued and placed in the hands of the defendant Redman a duly "certified list" of the delinquent taxes for said year, including said tax of $5,168.25. That defendant Redman is a Constable, or is a special deputy for the collection of said list, appointed by said Morrow, Trustee.

That this "certified list," under the laws of Tennessee, has the force and effect, by the express language of the statute, of "an execution from a court of record," and is authority for the said defendant to levy upon and sell and distrain any of complainant's property in Davidson County for the payment of said tax, commissions, and costs; and that said defendant has, by virtue of such authority, levied upon complainant's property in Nashville.

The bill then charges that said assessment is illegal, unjust, and void, for the following reasons:

"Your orator company is a corporation and citizen of Kentucky, having its chief office in said State, and merely doing business in Tennessee; wherefore it is advised, and thereupon shows and says, that the said shares of its stock are not liable to be taxed, and cannot be taxed, in and by the State of Tennessee; and it also further shows, and says, that even if any shares which are held by residents of Tennessee, if any such there be, are taxable in Tennessee to such holders respectively, the said tax so assessable and assessed

cannot be collected of and enforced against your orator company, because it is not and cannot be bound for, or obliged to pay, or collect and pay, any part thereof. Your orator is advised, that, by the laws of Tennessee, corporations which were chartered by that State, or the United States, and which have their chief office in Tennessee, may be obliged and required to retain out of any dividends payable to any stockholder the tax assessed against him upon his stock; but your orator was not chartered or created in Tennessee, or by the United States, but by the State of Kentucky, and also has its chief office in said last-mentioned State."

The bill then declares that irreparable wrong and injury will be done the complainant by the distraint and sale of its property in this:

"Said property is of a very peculiar value, and its chief value consists in the business done; that its business will be suspended and injured in a way not capable of being estimated if the central 'exchange board' or instruments or wires be seized by said defendant and the business be suspended, or will be if he distrain. Moreover, the public will be irreparably injured as well. Many merchants, manufacturers, and business men of Nashville use your orator's property and rely thereon in and for the carrying on of their business; and they will not only be greatly annoyed, but seriously interrupted and damaged by a seizure of your orator's property and a closing up of the business

upon which, as stated, they are now obliged to and do rely."

The bill then declares that the interruption and suspension of its business will subject the complainant to numerous damage suits on the part of its patrons and subscribers; and also, that the payment of the tax would subject the complainant to suits by its stockholders who are residents of other States, if the complainant, after such payment, retains the same out of the dividends payable in said shares, as it will be obliged to do.

The complainant then prays for leave to file this bill against said Morrow, Trustee, and said Redman, Constable, as defendants thereto; and that they be enjoined from attempting to collect the said tax as such officers. (*Pages* 1, 2, 3, 4.)

Upon the complainant's motion, a temporary injunction was issued in accordance with the prayer of the bill. (*Page* 6.)

The defendants moved to discharge the preliminary injunction and dismiss the bill in so far as the same seeks to enjoin and restrain defendants, as Trustee and Constable of Davidson County, from collecting State taxes for the year 1888, upon the following grounds:

1. Said suit as to the State taxes is in effect a suit against the State, and for which the State has given no permission.

2. It is a suit against officers of the State, acting by authority of the State, with a view to reach, and does reach, the treasury and funds of the State, and is expressly forbidden by statutes of said State —Acts 1873, Chap. 13.

3. The bill seeks to, and the injunction does, enjoin said officers from collecting taxes assessed against the complainant, and claimed to be due the State for the year 1888, and such and all similar proceedings are expressly forbidden by the statute of said State—Acts 1873, Chap. 44, Secs. 1, 2.

4. The said Act of 1873, Chap. 44, Sec. 1, affords complainant a complete, adequate, and unembarrassed remedy at law, by payment and suit to recover back the taxes complained of, as therein provided.

5. Independent of said statute, the complainant has a complete, adequate, and unembarrassed remedy at law, by payment of taxes under protest and suit to recover back, there being no allegation of insolvency of the defendants. (*Pages* 7, 8.)

This motion was overruled, and thereupon the defendants filed their answer, as follows:

THE ANSWER OF H. B. MORROW AND W. W. REDMAN TO THE BILL FILED AGAINST THEM IN THE ABOVE ENTITLED CAUSE.

Respondents, for answer, say they cannot admit that the complainant was organized under the laws of Kentucky, and demand proof of such incorporation. Respondents deny that complainant's chief place of business is in Kentucky. Its chief place of business is in Nashville, Tennessee, where reside its

principal officers, including the president and secretary and general manager and, as respondents are informed, a majority of its board of directors. A large number of the share-holders of complainant live in Tennessee, but as to the amount of stock owned by said resident share-holders respondents cannot state. They file herewith, as "Exhibit A" to this answer, a list of complainant's share-holders who were residents of the State on January 10, 1888.

Respondents cannot state the amount of stock owned by the parties set forth in said exhibit, but will produce at the hearing testimony as to such amounts so held. The statements in the bill as to the purposes of complainant's incorporation are not known to these respondents to be true, and cannot be admitted; nor have respondents any knowledge as to the number of plants owned and operated by complainant, nor the location of such plants. Respondents admit that complainant has a plant at Nashville, as stated in the bill, but which is the most valuable part of said mechanical contrivances and to whom it belongs, respondents do not know. Respondents admit that complainant has permission by State and municipal law to conduct its business in Nashville and Davidson County, and that it has been engaged in said business for many years. Respondents admit that the capital stock of complainant is $1,148,000, as stated in the bill. Respondents admit that complainant has never been chartered by the State of Tennessee, but respondents insist that complainant is organized under the laws of Tennessee. Respondents admit the assessment of complainant's property as stated in the bill, but whether complainant had or had not notice of the action of the Board of Equalization, respondents cannot state.

Respondents admit that complainant paid the property tax, but refused to pay the $5,168.25, as stated in the bill.

Respondents admit that said tax-books came into the hands of respondent, H. B. Morrow, as Trustee for Davidson County, and that he issued and placed in the hands of W. W. Redman, a Constable for —— of Davidson County, a certified list of the delinquent taxes, including said tax of $5,168.25, and that respondent Redman, as stated in the bill, has levied upon com-

plainant's property, and would have sold the same had not the injunction been issued in this case. Respondents deny that said assessment is illegal, unjust, and void. Respondents deny that respondents' action will subject complainant to irreparable injury and wrong, for the complainant can, under the laws of the State, pay the tax and sue the officer for its recovery. And now, having fully answered, respondents pray to be hence dismissed, etc.

The only evidence in the case is the deposition of W. E. Eastman, taken in behalf of the complainant. (*See pages* 8, 9, 10, 11, 12.) The witness states, in substance, as follows:

He is a resident of Nashville, Tenn., and the general manager of the telephone company. The company was chartered and organized in the State of Kentucky in 1883. (Properly certified copies of the charter and amendments thereto were filed as exhibits to the deposition, but were not copied in the record by agreement of counsel. See page 13.) The company's chief office is in Henderson, Ky., where it keeps books and records, and where the meetings of the stockholders are held, and no such meetings have been held elsewhere. Its directors' meetings are held at Henderson, Ky., and at Nashville, Tenn.—mostly at Nashville. No charter or amendment has ever been granted in Tennessee. There were in 1888 nine exchanges or local plants in Tennessee, Nashville and Memphis being the largest and about the same. There are also exchanges in Indiana, Kentucky, Illinois, and Mississippi. The telephones are owned by the Bell

Telephone Company, of Boston, and leased by complainant.

Question 18. State the nature of your business, and whether or not a seizure or sale of the company's property would result in serious injury to it.

Ans It would be serious, and the interference would be as described in the bill, which was sworn to by me, and to which I here refer.

On cross-examination the witness was asked:

Question 3. Please examine the exhibit to the answer, and state if this is not a correct list of the stockholders of said company resident in Tennessee on January 10, 1888.

Ans. It is not.

Question 4. What was the aggregate amount of the stock owned by residents of Tennessee on January 10, 1888?

Ans. I decline to answer, it being the private business of the company, and it being, as we are advised, under no obligation to reveal the fact to any one.

Question 5. What was the aggregate amount of stock owned by residents of Kentucky at same date?

Ans. I decline to answer, it being the private business of the company, and it being, as we are advised, under no obligation to reveal this fact to any one.

The defendants moved for a rule upon the witness to compel him to answer these questions, which was refused by the Court. (*Page* 13.)

Question 7. Please give the names, places of residence, and dates of election of the directors and officers of the company from its organization to the present time.

This question is answered fully and in detail. The company was organized by the election of di-

rectors and officers on June 8, 1883, none of the officers then elected being residents of Tennessee; but during the year 1886 all the officers were residents of Nashville, Tennessee, including the president, vice-president, secretary and treasurer, and general manager, the assistant secretary, however, being a resident of Henderson, Ky.; and since that time all the officers of the company have been residents of Nashville, except the assistant secretary, who resides at Henderson. No member of the board of directors has been a resident of Kentucky since 1885.

The witness further stated that the board of directors frequently met at Henderson, but, for want of a quorum, adjourned to Nashville; that duplicate sets of books are kept at Henderson and at Nashville, and both sets show all transfers of stock; that the gross receipts of the company in 1888 were $7,959 in Kentucky, and $186,927.98 in Tennessee.

The Circuit Court decreed:

First.—That the collection of said tax assessed against the complainant on the stock of its shareholders for the year 1888, as shown in the bill, be, and it is hereby, perpetually enjoined.

Second.—That all further proceedings under and by virtue of the certified list, or distress warrant, in the pleadings mentioned, be perpetually enjoined.

Third.—That the defendant, Henry B. Morrow, County Trustee, be perpetually enjoined from issuing any other or further certified list or distress warrant for said tax, costs, and penalties.

ASSIGNMENT OF ERRORS.

FIRST.

The Circuit Court erred in overruling the defendant's motion to dismiss the bill, for the reasons:

1. That the Court had no jurisdiction of the persons of the defendants, because the proceeding is a suit against the State of Tennessee.

2. That the Court had no jurisdiction of the subject-matter of the suit, because the complainant has a clear, adequate, and unembarrassed remedy at law.

SECOND.

The Circuit Court erred in rendering a final decree perpetually enjoining the collection of the tax assessed against the complainant, because the said tax was properly and legally assessed, and the complainant is liable therefor.

BRIEF.

FIRST.

The assessment was properly and legally made, and complainant is liable therefor.

1. Section 8 of the assessment act of 1887 directs the assessment of the shares of stock of corporations "organized under the authority of this State, or of the United States."

Complainant, though chartered under the laws of Kentucky, comes within the class designated in the statute. It has its permanent and continuous organization in the State of Tennessee. (*Eastman's deposition.*) All its shares of stock are, therefore, assessable at the place of its location—*i. e.*, Nashville, Davidson County, Tenn.

McLaughlin v. Chadwell, 7 Heis., 389.
Street Railroad Company v. Morrow, 87 Tenn. (3 Pickle), 406.

2. If complainant does not come within said class, yet the shares held by residents of Tennessee are assessable.

Sections 1 and 7 of the assessment act provide for the assessment of the shares of residents.

Section 9 directs the president or business manager of any bank, banking association, or other

corporation doing business under the laws of this State, to declare upon oath the amount of capital invested in such business, etc.

This section applies to non-resident corporations.

Street Railroad Co. v. Morrow, above cited. (Page 423.)

Sections 32 and 35 authorize the assessment of the shares directly to complainant. Such an assessment is legal and binding on complainant.

Bell's Ridge R. R. Co. v. Pennsylvania, 134 U. S., 232.
Tomlinson v. Board of Equalization, 88 Tenn. (4 Pickle), 1.

SECOND.

The Court has no jurisdiction over the persons of the defendants, because this proceeding is a suit against the State of Tennessee.

The statute under which the assessment was made, and under which these defendants were acting, is a valid law, and gives to the officers jurisdiction over the subject-matter and the property.

The complainant affirms no right protected by the Constitution or laws of the United States; nor does it claim that the action of the State officers was, or is, in violation thereof. Any error committed by them, through a mistaken construction of the statute, was, therefore, committed by them as officers of the State; and any wrong done the complainant by their action was done by them as such officers, and not as individuals. The relief

sought by the bill is, therefore, against the action of the State, and the proceeding is necessarily a suit against the State.

Osborn v. Bank of the United States, 9 Wheat., 768.
Davis v. Gray, 16 Wall., 220.
Board of Liquidation v. McComb, 92 U. S., 53.
Louisiana v. Jurnel, 107 U. S., 711.
Cunningham v. Macon & Brunswick R. R. Co., 109 U. S., 446.
Virginia Coupon Cases, 114 U. S., 270.
Hagood v. Sothern, 117 U. S., 52.
In re Ayres, 123 U. S., 443.
McGahey v. Virginia, 135 U. S., 662.
Erskine v. Hohnbach, 14 Wall., 613.

THIRD.

The Court has no jurisdiction over the subject-matter of the litigation, because the complainant has a clear, adequate, and unembarrassed remedy at law.

The act of March 21, 1873, provides a remedy for the tax-payer by suit against the collecting officer, after payment of the tax under protest.

This affords complainant ample remedy by suit at law, and hence no bill in equity will lie.

Virginia Coupon Cases, above cited, p. 300.
Dows v. Chicago, 11 Wall., 108.
State Railroad Tax Cases, 92 U. S., 575.
Cummins v. National Bank, 101 U. S., 153.
Hannewinkle v. Georgetown, 15 Wall., 547.
Union Pacific Railway Co. v. Cheyenne, 113 U. S., 516.
Lyon v. Alley, 130 U. S., 177.

ARGUMENT.

FIRST.

The tax was properly and legally assessed, and the complainant is liable therefor.

The law under which the assessment was made is the act passed on March 26, 1887, Chapter 2. As this act contains eighty-five sections, many of which are concerned with matters unimportant to this discussion, it is of course unnecessary to set it out in full. The sections pertinent to the questions here presented are given entire in the appendix to this brief, as also certain sections of the act of March 25, 1885, granting to telephone companies the right to construct and maintain their lines in the State; also the acts of February 28, 1873, Chapter 13, forbidding suits against the State, and of March 21, 1873, Chapter 44, providing a remedy for an unjust or illegal assessment, viz.: By payment under protest, and suit against the collecting officer to recover back the amount so paid.

Complainant's bill sets out specifically the grounds upon which it claims that the assessment is "illegal and unjust and void." These grounds are that the telephone company is a corporation chartered by the laws of Kentucky, having its chief office in that State, and merely doing business in the State

of Tennessee. Hence it insists that the shares of its stock cannot be taxed at all in Tennessee; and, further, that if the shares held by residents of Tennessee, *if any such there be*, are taxable in that State, said tax cannot be enforced against the company.

For the defendants it is insisted:

1. That under the assessment laws of Tennessee all the shares of stock in the company are taxable in that State.

2. If this be not so, that the shares owned and held by residents of Tennessee are taxable in that State, and that the mode and form of assessment in this case are proper and legal.

Section 8 of the assessment act of 1887 provides that no tax shall be assessed upon the capital of any corporation *organized* under the authority of this State or of the United States, but that the stockholders shall be assessed upon the market value of their shares of stock, and that said shares of stock shall be included in the valuation of personal property of such stockholders in the assessment of State, county, or municipal taxes at the place, town, ward, or district where such corporation is located. This mode of assessment was first adopted by an act passed on March 1, 1869, and has been continuously the law since then. It was adopted for the purpose of meeting the decisions of this Court in regard to the taxation of shares of

national banks, and is substantially the same as an act of the Legislature of New York passed upon in the case of *People* v. *The Commissioners*, 4 Wall., 244.

The Supreme Court of Tennessee, in the case of *McLaughlin* v. *Chadwell*, 7 Heis., 389, held that the shares of all stockholders might be taxed at the location of the corporation, although they themselves resided in counties and cities of the State other than that of the corporation's location. And in *Street Railroad Company* v. *Morrow*, 87 Tenn. (3 Pickle), 406, it was held that the shares of non-resident holders should be assessed at the place of the corporation's location.

If, then, the shares of stock in the complainant company are taxable at all in the State of Tennessee, they are properly assessed at the place of its location. If it has any location in Tennessee, that location is certainly in the city of Nashville, and Davidson County, where the assessment was made.

Are these shares taxable at all in Tennessee?

The complainant was chartered under the laws of Kentucky, and has never had a charter nor any amendment thereof under the laws of Tennessee. By the decisions of this Court the complainant is a resident of Kentucky in respect to the question of jurisdiction in this case; and it may be admitted that in the matter of its contracts and transactions

with other persons and corporations it is also a resident of that State.

Its stockholders' meetings to elect directors have always been held in Kentucky. If the words of the assessment act, "corporations organized under the authority of this State or the United States," apply solely and exclusively to the mode of the organization, then it may be further admitted that the complainant is not included in this description. But this statute is not concerned with questions of corporate organization as such, but is directed to the ascertainment and designation of things, real and personal, which the State has the power to assess for taxation. In these taxable things are included shares of stock in corporations, and the statute contains specific directions as to the manner of discovering these shares and the process of collecting the tax on them.

Now, the facts of this case show that the provisions of the assessment act may, and do, apply to the complainant as completely and specifically as if it had been chartered by the State of Tennessee.

The corporation was organized on June 8, 1883, by the election of a board of directors and officers. In this board there was elected one Paul J. Marrs, of Henderson, Kentucky, the only resident of that State upon the board. His term expired in 1885, and since then there has been no resident of Kentucky in the board. In the year 1886 all the offi-

cers of the company were residents of Nashville, Tennessee, and have so continued ever since, with the exception of a subordinate official—assistant secretary—who resides at Henderson, Kentucky. There has never been a meeting of the board of directors in the State of Kentucky, but these meetings have been uniformly held in Nashville. The dividends on the stock, of course, are declared and paid in Nashville; the books are kept in Nashville, at the office of the Secretary, duplicates being also kept in Henderson; the shares of stock are transferred upon the books at Nashville, and upon the duplicate set kept at Henderson. With the exception of the formal meetings of stockholders to elect directors, the whole organization of the company exists and performs its official acts within the State of Tennessee and under the authority of that State.

The bill states, and complainant's witness—its general manager—repeats, that the company's chief office is at Henderson, Kentucky. As a matter of fact, this is not true; its chief office or place of business is where its officers reside and perform their duties—that is, at Nashville. Certainly any business with complainant, in the transaction of which any official, corporate action was necessary, must be done where the corporate officials reside and discharge their duties—that is, at Nashville. As to the amount of business done by this company in the States of Tennessee and Kentucky, the record shows that its gross receipts in Kentucky

for 1888 were $7,959.09, while in Tennessee they were $186,927.98.

Section 10 of the assessment act requires to be kept in the office where the business of the corporation organized under the authority of this State or of the United States shall be transacted, a list of the names and residences of the stockholders, which shall be subject to the inspection of the taxing officers. This list, of course, is kept at complainant's office, in Nashville, where its secretary keeps the books of the company.

Section 11 authorizes the collection of the tax assessed upon the stockholders by attachment proceedings. Such process can be served upon complainant's officers in Nashville, and the stock subjected to the payment of the tax assessed.

Section 12 requires the president or managing officer of every such corporation doing business in the State to retain the amount of the tax assessed upon the shares out of the dividends belonging to the stockholders.

As the dividends in this company are declared by the board of directors in Nashville, and all its officers reside there, this provision applies clearly to complainant.

If this complainant had been chartered by the State of Tennessee it could not bring itself more effectively within the provisions of the assessment

law of that State than it is now. Unless the words "*organized* under the authority of this State" shall be held to mean nothing more nor less than *chartered* under the authority of this State, then the complainant's stockholders are liable to taxation in Tennessee. But, as said before, the Legislature was not concerned with the question of corporate organization as such, but with the matter of fixing the *situs* of the shares of stock for taxation, and prescribing methods for its collection. The complainant, by establishing its continuous and permanent organization in this State, has submitted its stockholders to the jurisdiction of the State for the purposes of taxation; and the stockholders, by accepting dividends declared by this organization within the State, are estopped to deny that jurisdiction.

If it be held that the words "*organized* under the authority of this State," are exactly equivalent to "*chartered* by this State," such a construction will open the door to numerous and successful evasions of the taxing laws of the State by corporations.

In most, if not all, of the States now charters are granted, not directly by the Legislature, but are taken out under general laws authorizing the formation of corporations by associations of individuals through the registration of the articles of incorporation, etc. The formation of a corporation, therefore, is about as easy as that of a partnership.

A number of gentlemen may take out a charter of incorporation, say in the State of Montana, issue the shares of stock to citizens and residents of Tennessee, establish the whole business of the concern and fix the permanent organization in that State, and not a single share of stock be subject to taxation in Tennessee. Indeed, under the construction contended for by complainant's counsel, it would not even be necessary that the stockholders should hold their meetings in Montana. They might all be held in Tennessee. Such meetings would still be held under the authority of the State where the charter was issued, and not under the authority of the State of Tennessee. And, however illegal and *ultra vires* of the charter such action might be when properly tested, yet, for the purposes of taxation, it would be conclusive upon the taxing officers of the State.

2. But, admitting that Section 8 of the assessment law applies exclusively to corporations chartered under the laws of Tennessee, this only determines that *all* the shares of stock, without regard to the residence of the owners, cannot be assessed under the provisions of that section.

Although complainant is a non-resident corporation, yet its shares of stock held by residents of Tennessee are subject to assessment in that State. Section 1 of the assessment act declares:

> That all property, real, personal, and mixed, shall be assessed for taxation for State, county, and municipal purposes, except such as is declared exempt in the next section.

The State Constitution, Art. II., Sec. 28, also declares that "all property, real, personal, or mixed, shall be taxed," with permission to the Legislature to exempt certain kinds of property.

Section 7 of the assessment act provides—

That personal property shall be assessed under the following heads:

1. The actual stock in each bank, or banking, insurance, or other stock company or corporation invested in business.

4. Notes, due-bills, negotiable paper, and accounts on solvent persons, or parties believed to be solvent, and all other assets, including cash on hand or on deposit, or invested in any manner in this State or elsewhere.

5. All bonds, stocks, and other like securities other than such as are exempt from taxation by the laws of the United States.

10. All other personal property, whether belonging to individuals, corporations, or firms.

11. The amount of income derived from United States bonds, and all other stocks and bonds not taxed *ad valorem*.

The Supreme Court of Tennessee have construed the above-quoted clause of the Constitution to mean that the Legislature had no power to exempt any species of property from taxation, except as permitted in the Constitution itself. This decision was approved by this Court in *Railroad Companies* v. *Gaines*, 97 U. S., 697.

The Legislature in the assessment act, has acted in obedience to the peremptory command of the Constitution, in providing for the assessment of all kinds of property. The shares in the complainant

company held by residents of Tennessee are personal property situated in the State, and are expressly included in the enumeration of the assessable property in Section 7, above quoted.

If, then, the complainant is, for all purposes, a non-resident corporation, yet the shares of stock owned by residents of the State are liable for taxation.

The objection made in the bill to the assessment is that these shares should be assessed to the holders and owners, and not to the corporation. The objection is not based upon any irregularity in the mode of the assessment, nor upon any want of power in the assessing officers to make the assessment, nor upon any excessive valuation of the property. The bill does not allege that there are no resident stockholders, nor does it deny that the shares of stock assessed are owned by resident stockholders. In the entire absence, therefore, of any such allegations, the Court must presume that all the stock assessed belonged to resident stockholders, and, further, that these stockholders were residents of Davidson County, the place where the assessment was made. The property and the owners, then, were within the jurisdiction of the assessing officers; and the only question is whether the assessment of the property to the corporation can be sustained. It is admitted that the assessment of the shares should have been made directly to the share-holders. This is the general rule of

law in regard to such assessments, but it is not an inflexible rule, and we insist that in this particular case the assessing officers did their exact duty in assessing these shares to the complainant. If it can be shown that the assessment act provides for a case of this kind, and authorizes the assessment of the shares of individual stockholders directly to the corporation, then the assessment is correct. In the entire absence of any allegation or proof to the contrary, the Court must presume that, if the power to make such an assessment exists at all, the circumstances justified the exercise of the power, and that the proper steps were taken by the assessing officers in accordance with the statute.

The final settlement of the State debt in 1883 imposed upon the State the obligation to meet the interest on the newly issued bonds. Moreover, by the decisions of this Court the State became liable to receive for taxes a large amount of the notes of the Bank of Tennessee, and provision was made in 1883 to take them up. The taxes in this State, as in all the other States, were formerly enforced by condemnation and sale in a summary proceeding. The result was here, as elsewhere, that titles to land by tax-sale were worthless.

The Legislature of 1885 adopted a system of collection by bills filed in the Chancery Court, to which the tax-payers were made parties, thus securing valid sales of land assessed.

The mode of assessing the shares of stock in corporations had been fixed by the act of 1869, and continued by subsequent Legislatures, with various amendments made to secure the more efficient discovery of information in regard to such shares. Although the officers of corporations were required to keep and furnish to the assessors lists of their stockholders, yet, in case of refusal to do so, the only remedy was by legal proceedings to compel the production of such lists. The act of 1869 also required every individual banker doing business under the laws of the State to declare, upon oath before the Assessor, the amount of capital invested in such banking business; and that for the purposes of taxation each one hundred dollars of such capital should be regarded as one individual share.

Statutes of Tennessee, 1871.
Thompson & Steger, Sec. 596*a*.

By the act of 1885, Section 9, this law was amended so as to read:

That the president or business manager of any bank, banking association, *or other corporation* doing business under the laws of this State, is hereby required to declare upon oath, before the Assessor, the amount of capital invested in such business, etc.

And this language is repeated in the assessment act of 1887. (*See Appendix.*)

Now, this section was construed in the case of *Street Railroad Company* v. *Morrow*, 87 Tenn. (3 Pickle), 423, above cited, as follows:

Section 9 is taken from the act of 1873. In the latter act it was manifestly limited to private banking associations. The original section has added to it words which seemingly make parts of it apply to all corporations. Just what is meant by this section it is unnecessary to say, further than that it has, in our opinion, no application to domestic corporations.

The section, therefore, manifestly applies to non-resident corporations. Whatever may be its proper construction, this section is certainly efficacious to exact from this complainant a discovery of the shares held by its resident share-holders. It is a corporation doing business in this State, and its president and general manager, and, in fact, its whole organization, are within the jurisdiction of the State.

The act of 1885 further provided that printed blanks should be furnished by the Assessors to every person, company, firm, or corporation, which should contain the following questions, among others:

4. What is the value of your personal property, and in what does it consist, and where situated?

5. Are you engaged in any banking business, or are you a share-holder or bondholder, or engaged in, or the officer of any incorporated bank or other corporation? If so, state the number of shares and bonds held by you and other share-holders or bondholders in said business, and the value of said shares or bonds.

And in Section 34 of said act it is further provided:

That in all cases where any person or persons acting in a fiduciary capacity, company, firm, or corporation, or agent or attorney, shall fail, neglect, or refuse to return to the Assessor the schedule of property for taxation, the Assessor shall report the facts to the chairman or Judge of the County Court, who shall cite the person, agent or attorney, firm, officer, officers of the company or corporation before him, and shall demand of them to answer the questions in Section 31 of this act, under oath, and shall have power to punish for contempt for failure to answer. And if the refusal to answer is persisted in, the Judge or chairman shall make such an assessment in each case from the best information he can obtain, *and such assessment shall be conclusive as to the value of the property and as to the ownership of the property.*

These provisions are repeated in the act of 1887. (*See Appendix.*)

Now, here are enactments specifically authorizing and directing an assessment to be made of the shares of stock to the corporation. In the entire absence of any allegation or proof to the contrary, it must be presumed in favor of the action of the assessing officers, that they have taken all the steps necessary to justify an assessment of the shares of stock against the complainant company. And this legal presumption is strengthened by the fact that the complainant's general manager—its witness in this case—peremptorily refuses to give any information in regard to the shares of stock held by residents of Tennessee.

In the case of *Tomlinson* v. *Board of Equalization*, 88 Tenn. (4 Pickle), 1, the Supreme Court of Tennessee held that the action of the Board of Equal-

ization in fixing the value of property was final and conclusive upon the tax-payer, and could not be re-examined, even upon a proceeding by *certiorari*, the statute having prescribed that "the action of this Board as to valuation shall be final."

By the law of Pennsylvania, if the treasurer of a corporation fails to make returns of its loans, the Auditor-general makes out and files an account against the company, charging it with the tax supposed to be due. A railroad company refused to make the return required by law, and it was assessed on its bonds to the amount of $539,000. It resisted the tax on the ground that it had been assessed on property not belonging to it. This Court says:

> This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use—namely, the interest to be paid—is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, and not on the corporation. The plan is adopted as a matter of convenience, and as a secure method of collecting the tax; that is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection.
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> **Bell's Ridge R. R. Co. v. Penn., 134 U. S., 232.**

The complainant certainly does not occupy very high ground from which to make an attack upon the assessment, since it positively refuses to give any information in regard to the shares of its res-

ident stockholders. The assessing officers have been compelled to get information as they could, and their action as to the ownership and value of the property is final. Complainant, by its refusal to give the information upon which the assessment can be made, is estopped to question the regularity or legality of the decision made by the proper officers. It should not be allowed to take advantage of its own wrong. It does not assert or attempt to show that these resident share-holders have ever been assessed individually upon their shares of stock, or have ever paid a cent of taxes thereon.

SECOND.

The Court has no jurisdiction over the persons of the defendants, because this proceeding is a suit against the State of Tennessee.

The wrong complained of in the bill is the issuance of a distress warrant by one of the defendants, who is the County Trustee, and the threatened levy of the warrant on the personal property of the complainant, for the purpose of collecting taxes assessed to complainant, but which the bill alleges were wrongfully so assessed, and the collection of which should be enjoined.

The defendants say that they are officers of the State of Tennessee, upon whom the statutes of the State impose the duty of collecting its taxes by the issuance and levy of distress warrants; and that

this duty they were proceeding to perform when restrained by the injunction in this case.

The statutes under which they justify their action are, they say, valid and constitutional laws of the State, and are their authority for so acting. Hence, they say that this suit is brought against them, not as individuals, but as officers of the State seeking to enforce its laws, and therefore is necessarily a suit against the State itself, which is expressly forbidden by the eleventh amendment to the Constitution of the United States.

In *Osborn* v. *The Bank of the United States*, 9 Wheat., 768, Chief Justice Marshall says: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against States is, of necessity, limited to those suits in which a State is a party to the record."

In *Davis* v. *Gray*, 16 Wall., 220, the same doctrine is laid down.

This ruling, however, has been repudiated by this Court, and is no longer a guide in determining the question here at issue.

New Hampshire v. Louisiana and New York v. Louisiana, 108 U. S., 76.

Virginia Coupon Cases, 114 U. S., 287.

In *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S., 450, Mr. Justice Miller says in regard to this class of suits: "And it must be confessed that, in regard to both classes of cases, the questions raised have rarely been free from difficulty, and the Judges of this Court have not always been able to agree in regard to them; nor is it an easy matter to reconcile all the decisions of the Court in this class of cases."

Whatever may be the differences of opinion in regard to this question, it is asserted that this principle will be found running through all the decisions of this Court: When a State officer is sued for an alleged injury committed, or about to be committed, against the property of an individual, and he pleads as his authority a statute of his State, if the Court, upon investigation, finds that this statute violates some right secured to the plaintiff by the Constitution or laws of the United States, and is therefore void, it will treat the defendant as acting, not as an officer of the State, but upon his personal responsibility, and hence liable to suit.

If, on the other hand, the statute under which the defendant justifies is not violative of any right secured by the Constitution and laws of the United States, the Court will treat the defendant's acts complained of as the acts of the State, and refuse to entertain jurisdiction.

However wrongful may be the action of the

State's officers, resulting from an erroneous construction of their authority under the State statute, yet if that statute does not conflict with the Constitution or laws of the United States, the officer's act is still the act of the State, and he will not be subject to suit.

In this case, as shown by the bill, the tax-books came regularly into the hands of the defendant Morrow, the County Trustee, having thereon the assessment against complainant properly entered. In accordance with his duty under the law, he issued to the defendant Redman a "certified list" of the delinquent taxes, including the tax against complainant. This list, under the law, has all the force and effect of an "execution from a court of record," and the defendant Redman, as a Constable and special deputy, was obliged to execute it. These defendants, therefore, were acting by virtue of process regular and valid upon its face, and as purely ministerial officers in the performance of their duties; and the bill seeks to enjoin them as such officers, and not as individuals about to commit a trespass.

The wrong complained of is in the action of the assessing officers, and this, not upon the ground that they were acting under a void statute, but that they had made a mistake in assessing to complainant property not belonging to it. In this matter they were certainly acting as State officers, and not as individuals.

The leading case upon the question of suit against a State is that of *Osborn* v. *The Bank of the United States*, 9 Wheat., 741. This Court had held, in the case of *McCulloch* v. *The State of Maryland*, 4 Wheat., 426, that the States had no authority to tax the Bank of the United States. The State of Ohio passed an act reciting that the Bank of the United States was pursuing its operations contrary to a law of the State, and provided that, if it continued so to do after a certain date, it should become liable to pay a tax of fifty thousand dollars on each office of discount and deposit. The purpose of the statute was to drive the bank out of the State. The bank filed a bill in the United States Circuit Court to enjoin Osborn, the Auditor of the State, from executing the law. After service of the writ of injunction, and in defiance thereof, Osborn seized and took from the bank one hundred thousand dollars in specie and bank notes, and deposited it with the State Treasurer, who kept it in a box separate from the other funds of the State. The bank thereupon filed an amended and supplemental bill to recover this fund from the State officers, and to enjoin them from proceeding further under the act. The bill was sustained by this Court, the opinion being delivered by Chief Justice Marshall. It was held, following *McCulloch* v. *Maryland*, that the statute of Ohio laying a tax upon the bank was unconstitutional and void, and hence furnished no justification to the defendants. The basis of the opinion is that it is within the power and duty of the Court to protect the agencies

of the United States from unlawful interference by State action. It is said:

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own Courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the Government. * * * Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agent to make compensation. * * * The question, then, is whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.

And again:

It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the Constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which the suit was instituted.

The protection accorded in this decision to the agencies of the United States from unlawful interference by State statutes has been extended to individuals claiming rights under the Constitution and laws of the United States.

In *Davis* v. *Gray*, 16 Wall., 203, the Governor of Texas was enjoined from issuing grants to lands formerly granted by the State to a railroad company in its charter. The Court say:

> That the act of incorporation and the land grant here in question were contracts is too well settled in this Court to require discussion. As such, they were within the protection of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. The ordinance of 1869 and the Constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view.

Board of Liquidation v. *McComb*, 92 U. S., 531, was a bill against certain State officers of Louisiana to enjoin them from using the bonds known as consolidated bonds for the liquidation of a debt due by the State to the Louisiana Levee Company, and from issuing any other State bonds in payment of said pretended debt. The complainant was the owner of certain bonds issued by the Board of Liquidation, under an act of 1874, for the purpose of consolidating the debt of the State. These bonds were to be issued and used for the purpose of taking up certain other bonds at a discount of forty per cent., and a special tax was levied to pay the interest. They were declared to be a contract

between the State and the holders thereof, and that the tax levied should be used for no other purpose than to pay said interest. The Board of Liquidation, acting under the provisions of a subsequent statute, passed for that purpose, were about to issue some of this series of bonds in violation of the act of 1874. This Court sustained the bill, upon the ground that the last act was void as impairing the obligation of a contract protected by the Constitution of the United States. Mr. Justice Bradley, speaking to the question of jurisdiction, says:

> But it has been well settled that when official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writ of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void.

The creditors of Louisiana having thus succeeded in stopping the State officers from using the consolidated series of bonds for the purpose of paying a debt not provided for in the act of 1874, their next step was an attempt to secure the payment of the interest on their bonds by proceedings against the State officers. In *Louisiana* v. *Jumel*, 107 U. S., 711, they asked this Court to sanction proceedings begun in the court below by *mandamus* and

bill in equity to compel the payment of the interest on the bonds. The State officers had refused to do so, because prohibited by a constitutional ordinance enacted in 1879. Although this ordinance did impair the obligation of the State's contract with the bondholders, yet this Court refused to sustain the proceedings, because they were suits against the State.

In *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S., 446, the Court refused to entertain jurisdiction of a bill filed against the Governor and other officers of the State of Georgia. The State had indorsed bonds of the defendant railroad company and taken a mortgage to secure the same. The Governor had sold the road and made a conveyance of it to the State. The bill was filed in the United States Circuit Court by a holder of bonds indorsed by the State under an act subsequent to the issuance of the first series, and sought to set aside the sale made to the State, because the Governor had advertised that he would receive in payment of bids only bonds of the first series; also, because the sale was improvidently made, *and because the Governor was not authorized to bid for the property, and the State had no constitutional power to make the purchase.* The Governor and Treasurer of the State pleaded that the proceeding was a suit not against themselves individually, but really against the State; and this view was taken by the Court, Mr. Justice Miller delivering the opinion. He says:

The failure of several of the States of the Union to pay the debts which they have contracted, and to discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no State can be sued in the ordinary courts as a defendant, except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations by judicial proceedings to which the State is not a party.

In regard to the case of *Davis* v. *Gray*, the opinion says:

But it is clear that in enjoining the Governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further.

And again:

In the case now under consideration, the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked.

It will be observed in this case that the Court refused even to consider the question raised by the bill—viz.: That the sale was invalid, and that the State had no constitutional right to make the purchase. It was clearly the opinion of the majority of the Court that these facts, if true, would not have affected the question of jurisdiction. Mr. Justice Harlan, in the dissenting opinion, calls attention explicitly to these allegations of the bill. He says:

But the suit, as is quite clear, proceeds upon the ground that Georgia, by her officers, is not rightfully in possession, and that no valid title passed to the State by virtue of the sale in ques-

tion. The issue is distinctly made in the bill that the Governor was not authorized to bid in the property, and that the State had no constitutional power to make the purchase.

In the *Virginia Coupon Cases*, 114 U. S., 270, the question of jurisdiction in this class of suits was elaborately discussed by Mr. Justice Matthews, speaking for the majority, and Mr. Justice Bradley, speaking for the minority of the Court. The first case—*Poindexter* v. *Greenhow*—was an action of detinue, begun in the State Court by a tax-payer to recover certain personal property seized by the defendant, a taxing officer of the State of Virginia. The plaintiff had tendered coupons of State bonds in payment of the tax, which the defendant refused to accept, and seized the property to satisfy the taxes assessed against the plaintiff. The defendant justified the seizure under an act of January 26, 1882, which directed the taxing officers to receive in payment of taxes "gold, silver, United States treasury notes, national bank currency, and nothing else." To this the plaintiff replied that said act was void because in conflict with the Constitution of the United States, and therefore afforded to the defendant no protection for his wrongful action. And this view was sustained by the decision of the majority of the Court. It was held that the law of Virginia authorizing the issuance of the bonds and the coupons was a contract between the State and the bondholders, whereby the latter secured the right to pay all taxes in the coupons, and that this contract was protected by

the Constitution of the United States. Hence, that the subsequent act of 1882 was directly in violation of the Constitution, and could afford the defendant no justification for the seizure. That thus stripped of all authority, his act was not that of an officer of the State of Virginia, but was that of an individual, and hence utterly without any legal excuse. The principle is stated clearly and forcibly thus:

> This immunity from suit secured to the States is undoubtedly a part of the Constitution, of equal authority with every other, *but no greater, and to be construed and applied in harmony with all the provisions of that instrument.* That immunity, however, does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. (*Page* 286.)

And again:

> The immunity from suit by the State, now invoked vainly to protect the individual wrong-doers, finds no warrant in the eleventh amendment to the Constitution, and is, in fact, *a protest against the enforcement of that other provision which forbids any State from passing laws impairing the obligation of contracts. To accomplish that result requires a new amendment, which would not forbid any State from passing laws impairing the obligation of its own contracts.* (*Page* 297.)

In *Allen* v. *Baltimore and Ohio Railroad Company*, page 316, the Court say:

> The remedy to restrain, by injunction, taxes levied upon railroads, in alleged violation of a contract with the State, was administered in *Tomlinson* v. *Branch*, 15 Wall., 460; and in numerous other similar cases, where it has been denied, the jurisdiction

to grant the relief, if the facts had warranted it, has been assumed without question. And see *Litchfield* v. *County of Webster*, 101 U. S., 773.

In the case of national banks, the assessment and collection of taxes illegally assessed under the authority of State laws in violation of acts of Congress, are habitually restrained by the preventive remedy of injunction; and the jurisdiction of the Courts of the United States in those cases is regarded as in the highest degree beneficial and necessary to prevent the agencies of the Government of the United States from being hindered and embarrassed in the performance of their functions by State legislation. The exercise of that jurisdiction, and by means of that remedy, in such cases is to vindicate the supremacy of the Constitution and to maintain the integrity of the powers and rights which it confers and secures; and that jurisdiction is vested in the Courts of the United States, because the cases embraced in it are necessarily cases arising under the Constitution and laws of the United States.

Where the rights in jeopardy are those of private citizens, and are of those classes which the Constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies, in cases to which its remedies can be applied, that jurisdiction in equity vested by the Constitution of the United States, and which cannot be affected by the legislation of the States.

The principles enunciated in the Virginia coupon cases have been approved and repeated in the subsequent decisions of this Court.

See Hagood v. Sothern, 117 U. S., 52.
In re Ayres, 123 U. S., 443.
McGahey v. Virginia, 135 U. S., 662.

That principle has no application to the case now before the Court. It is not pretended that the

statute under which the assessment was made is in conflict with the Constitution or laws of the United States. It is a valid law, and furnished complete authority to the assessing officers in rendering their decision in the matter of the assessment. Assuming that they have committed errors in the performance of their duties, they were the errors of agents of the State, and not of individuals acting upon their own responsibility. This being the case, how can these defendants be held as wrongdoers? The liability of the collecting officer in the Virginia coupon cases was put upon the ground that the tender of the coupons was *ipso facto* a payment of the tax, and deprived him of all authority to proceed any further with his warrant. The statute forbidding the receipt of coupons for taxes was directed to *him*, and in electing to obey an unconstitutional enactment he became a trespasser *ab initio*. But these defendants are simply attempting to execute the process emanating from a tribunal with full authority over the subject-matter and the property. In *Erskine* v. *Hohnbach*, 14 Wall., 613, Mr. Justice Field says:

> Whatever may have been the conflict at one time in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts and render judgment thereon, it is well settled now, that if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no de-

parture from the law or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued.

If, then, the defendants would not be liable to the complainant as trespassers, it necessarily follows that their liability, if any there be, would be incurred by them only as agents of the State, and the wrong committed or threatened by them would be the wrongful act of the State. This proceeding, therefore, is certainly a suit against the State.

THIRD.

The Court has no jurisdiction over the subject-matter of the litigation, because the complainant has a clear, adequate, and unembarrassed remedy at law.

The act of March 21, 1873, provides that if any person against whom a proceeding to collect any tax due the State shall be instituted, conceives the same to be illegal or unjust, he shall pay the tax under protest, and may, at any time within thirty days after such payment, sue the collecting officer for the recovery thereof. If he succeed in the suit, the Court trying the case may certify of record that the same was wrongfully paid and ought to

be refunded, and, thereupon, the Comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury. The act further provides that no writ for the prevention of the collection of such tax shall issue, either injunction, supersedeas, prohibition, or any other writ or process.

In *Tennessee* v. *Sneed*, 96 U. S., 69, a proceeding by *mandamus* to compel the collecting officer to receive Bank of Tennessee notes for taxes, the Court declared that this statute afforded an ample and complete remedy to the tax-payer.

In the Virginia coupon cases a statute similar to that above cited was considered by the Court. It was insisted by counsel for the State that the statute afforded an adequate and complete remedy to the tax-payer. The Court say:

> The answer is obvious and complete. Virginia, by a contract which the Constitution of the United States disables her from impairing, has bound herself that it shall be otherwise. The State has agreed that the coupons cut from her bonds shall be received in payment of taxes due to her, as though they were money. When the tax-payer has tendered such coupons he has complied with the agreement, and in legal contemplation has paid the debt he owed the State. So far as that tax is concerned, and every step taken for enforcing its payment in disregard of that tender, the coupon holder is withdrawn from the power and jurisdiction of the State. He is free from all further disturbance, and is securely shielded by the Constitution in his immunity. No proceeding, whatever its pretext, which does not respect this right, can be judicially upheld. (*Page* 300.)

So far, then, as the rights of the tax-payer tendering coupons was concerned, this statute was as thoroughly eliminated as if it had no existence. The discussion, therefore, of the question of remedy at law in the injunction case of *Allen* v. *Baltimore & Ohio R. R. Co.*, page 311, proceeds upon the ground that no such statute is in existence; but this principle cannot apply to the case now under discussion.

The act of 1873 was passed by the Tennessee Legislature some ten years before the plaintiff came into existence as a corporation. There is no contract between complainant and the State which gives it any equitable right to disregard the statute. If there is any contract at all, it is the implied contract made by the complainant when granted valuable rights and privileges by the act of 1885, permitting it to come into the State, that it would submit to its laws as fairly and fully as residents of the State. The irreparable injury alleged in the bill is such injury as any corporation with extensive works and large business would suffer in the seizure of its property for the payment of its debts. It can avoid all injury by paying the tax and suing to recover it back.

The language of this Court in the *State Railroad Tax Cases*, 92 U. S., 575, quoted with approval in *Allen* v. *Baltimore and Ohio Railroad Company*, lays down clearly the principle applicable to this case. It is there said:

In the examination which we have made of these cases we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proven, if alleged. There is no violation of the Constitution, either in the statute or in its administration by the board of equalization. No property is taxed that is not legally liable to taxation; nor is the rule of uniformity prescribed by the Constitution violated.

In *Dows* v. *Chicago*, 11 Wall., 108, a tax was assessed upon a stockholder in a national bank, and he filed a bill to enjoin its collection. The Court say:

Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute, of themselves alone, no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

No court of equity, therefore, will allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the

complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived. * * * Here such remedy existed. If the tax was illegal, the plaintiff, protesting against its enforcement, might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages No irreparable injury would have followed to him from its collection; nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action.

And so in this case the complainant's remedy would be adequate at law, by payment of the tax and suit to recover it back. There could be no irreparable injury.

In regard to the question of a multiplicity of suits at law, this Court say, in *Cummings* v. *The National Bank*, 101 U. S., 153:

It is next suggested that since there is a plain, adequate, and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.

The reply to that is that the bank is not in a condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders, an agency created by the statute of the State. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank as a corporation is not liable for the tax, and occupies the position of a stockholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws

and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent a multiplicity of suits, equity may interfere.

But in this case the tax is assessed directly to the complainant, and not to the stockholders, and, indeed, this is the ground of his complaint against the assessment. If, then, complainant pays the tax, it will simply pay its own debt, and can sue for its recovery in one suit. The stockholders can certainly have no legal complaint against the corporation for paying its own debt. It would be different if they were personally assessed.

Every resident of Tennessee seeking redress for unjust or illegal State taxes imposed upon him must comply with the act of 1873, by payment of the tax and suit for recovery.

It is respectfully submitted that the facts of this case do not warrant the extending to this complainant, simply because it is technically a non-resident, equitable relief necessarily out of the power of the Court to grant to residents of the State.

S. WATSON,

Solicitor and Counsel for the Appellants.

APPENDIX.

Act of February 28, 1873, Chapter 13, page 15, prohibiting suits against the State:

SEC. 2. *Be it further enacted*, That no Court in the State of Tennessee, has, nor shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the State, or against any officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds, or property, and all such suits now pending, or hereafter brought, shall be dismissed, as to the State or such officers, on motion, plea, or demurrer of the law officer of the State or counsel employed for the State.

Act of March 21, 1873, Chapter 44, page 71, providing remedy for tax-payer by suit against the collecting officer:

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That in all cases in which an officer charged by law with the collection of revenue due the State, shall institute any proceeding, or take any steps for the collection of the same alleged or claimed to be due by said officer, from any citizens, the party against whom the proceeding, or step, is taken shall, if he conceives the same to be unjust, or illegal, or against any statute, or clause of the Constitution of the State, pay the same under protest, and upon his making such payment the officer or Collector shall pay such revenue into the State Treasury, giving notice at the time of payment to the Comptroller, that the same was paid under protest; and the party paying said revenue may, at any time within thirty days after making said payment, and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof, and the same may be tried in any Court having jurisdiction of the amount and parties, and if it

be determined that the same was wrongfully collected as not being due from the said party to the State for any reason going to the merits of the same, then the Court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the Treasury.

SEC. 2. *Be it further enacted*, That there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally, or attempt to collect revenue in funds only receivable by said officer under the law, the same being other or different funds, than such as the tax-payer may tender, or claim the right to pay, than that above provided, and no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in anywise issue, either injunction, supersedeas, prohibition, or any other writ or process whatever, but in all cases in which for any reason any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and in no other manner.

Act of March 25, 1885, Chapter 66, page 120, granting privileges to telephone companies:

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That any person or corporation organized by virtue of the laws of this State, or of any other State of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence the equivalent thereof, which may be hereafter invented or discovered, may construct, operate, and maintain such telegraph, telephone, or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of the cities and towns of this State, or across and under the waters, and over any lands or public works belonging to this State, and on and over the lands of private individuals, and upon, along, and parallel to any of the railroads or turnpikes of this State, and on and over

the bridges, trestles, or structures of said railroads; *Provided*, That the ordinary use of such public highways, streets, works, railroads, bridges, trestles, or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of such lands, railroads, and turnpikes, by reason of the occupation of said lands, railroads, and turnpikes by said telegraph or telephone corporations.

SEC. 2. That in the event such telegraph or telephone companies should fail, upon application to such individuals, railroads, or turnpike companies, to secure such right of way, by consent, contract, or agreement, then such telegraph or telephone corporations shall have the right to proceed to procure the condemnation of such property, lands, rights, privileges, and easements, in the manner prescribed by law for taking private property for works of internal improvement.

SEC. 3. That when any such telegraph or telephone company shall desire to construct lines on or along the lands of individuals, or on the right of way and structures of any railroad, or upon and along any turnpike, the said telegraph or telephone company may, by its agents, have the right to peacefully enter upon such lands, structures, or right of way, and survey, locate, and lay out its said lines thereon, being liable, however, for any damage that may result by reason of such act.

SEC. 4. No telegraph or telephone corporation organized by virtue of the laws of this State, or doing business in this State by virtue of the laws of any other State, or of the United States, shall have the power to contract with the owners of lands, or the rights in lands, or with any other person or corporation for the right to erect, operate, or maintain telegraph, telephone, or other lines or works for the speedy transmission of intelligence, over his or its lands, privileges, rights, or easements, to the exclusion of other persons or corporations, authorized to erect and operate lines and works for the speedy transmission of intelligence.

SEC. 5. In consideration of the right of way over the public property herein conceded, every telegraph or telephone corpo-

ration shall, in the case of war, insurrection, or civil commotion of any kind, and for the arrest of criminals, give immediate dispatch at the usual rates of charge to any message connected therewith of any officer of the State, or of the United States.

Assessment Act of March 26, 1887, Chapter 2, page 24:

SEC. 8. *Be it further enacted*, That no tax shall hereafter be assessed upon the capital of any bank or banking association, or any other joint stock company or corporation organized under the authority of this State or of the United States; but the stockholders and bondholders in such bank or banking association, or other corporation, shall be assessed and taxed on the market value of their shares of stock and bonds therein; said shares of stock and bonds shall be included in the valuation of personal property of such stockholders or bondholders in the assessment of State, county, or municipal taxes at the place, town, ward, or district where such bank or banking association, or other corporation is located (except otherwise provided by law), whether said stockholder or bondholder resides in said place, town, ward, or district or not; and all banks or banking associations, or other corporations, shall, in addition, be liable for taxes on any property, funds, or assets owned by them not included in the foregoing provisions of this section; and the property and shares of stock in companies or corporations organized under the laws of the State of Tennessee, and firm or firms engaged in manufacturing articles of the produce of this State exclusively, shall be assessed as one property, in the same manner as the property of firms and individuals is assessed.

SEC. 9. *Be it further enacted*, That the President or business manager of any bank, banking association, or other corporation doing business under the laws of this State, is hereby required to declare upon oath before the Assessor, the amount of capital invested in such business, and the amount of bonded indebtedness, if any, outstanding against the same, and each one hundred dollars of such capital and bonded indebtedness, for the purpose of this act, and for the purpose of taxation, shall be

held and regarded as one individual share in such bank, banking association, or other corporation, and such shares are hereby declared to be personal property. If such president or business manager have partners, he shall declare upon oath before the Assessor the number of shares held or owned by each of them in such business, ascertained as above provided, and the shares so held by any partner shall be included in the valuation of his taxable property in the assessment of all taxes levied in the city, town, ward, or civil district where such business is located, except herein otherwise provided; and said president or business manager shall pay the same, and make the amount so paid a charge in his account with said partners; and if said president or business manager have no partners, he shall be held to be the sole owner of all the shares in said business, and the same shall be included in the valuation of his personal property in the assessment of all taxes levied in city, town, ward, or district where said business is located, except herein otherwise provided.

SEC. 10. *Be it further enacted*, That there shall be kept at all times in the office where the business of such bank, banking association, or other corporation, organized under the authority of this State, or of the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders and bondholders therein, and the number of shares and the amount of bonds held by each, and such list shall be subject to the inspection of the officers authorized to assess taxes, during the business hours of each day on which business may be legally transacted.

SEC. 11. *Be it further enacted*, That when the owner of stock or bonds in any bank, or banking association, or other corporation organized under the laws of this State, or of the United States, shall not reside in the same county where the bank or corporation is located, or is a non-resident of this State, the revenue collector for the State, county, or municipality shall respectively have the power to collect the tax assessed by this act, by instituting attachment proceedings, and said tax shall be and remain a lien on the stocks or bonds until the payment of the same.

SEC. 12. *Be it further enacted*, That for the purpose of collecting such taxes, and in addition to any other laws of this State relative to the imposition and collection of taxes, it shall be the duty of the president or managing officer of every such bank or other corporation doing business in the State, to retain so much of any dividend or interest belonging to such stockholder or bondholder as may be necessary to pay any and all taxes assessed in pursuance of this act, until it shall be made to appear to such officers that said taxes have been paid.

* * *

SEC. 32. *Be it further enacted*, That the Assessor shall furnish every person, company, firm, or corporation in each ward and district, proper blanks for the purpose of listing and assessing all property and polls; and it is hereby made the duty of the Comptroller of the Treasury to furnish the Clerks of the County Courts said blanks, to be distributed by the Clerk to the Assessor, which shall contain among others necessary to ascertain all taxable property, the following questions, and the Assessor shall require all parties liable either for a property or poll-tax to fill out separate lists:

1. How many acres of land do you own? In what civil district, range, or Surveyor's district is it located, and by whose land is it bounded on the east, south, west, and north?

2. How many town lots do you own? What is their number, and in what town located? What is the number of front feet and depth of the lot?

3. What is your age? Is there any reason why you are not liable for poll-tax?

4. What does your personal property consist in, and where situated? Have you conveyed, converted, or disposed of any property, personal, real, or mixed, in any manner, or created any debt for the purpose of evading the provisions of law or affecting the value and amount of your taxable estate?

5. Are you engaged in any banking business, or are you a share-holder, or bondholder, or engaged in, or the officer of, any incorporated bank or other corporation? If so, state the number of shares and bonds held by you and other share-holders or

bondholders in said business. And the Assessor shall require oath to be made to the correctness of the items thereof, and the questions thereon, which oath shall be administered by the Assessor (who is hereby authorized to administer same), or some Justice of the Peace, and entered thereon beneath said list, and signed and sworn to by the party listing. And nothing in this act shall be so construed as requiring the property-holder to make oath as to the value of any of his property, but the Assessor is hereby required to assess and fix the value of all property as herein required, and report all persons violating this act to the grand jury.

* * *

SEC. 35. *Be it further enacted*, That in all cases where any person or persons acting in a fiduciary capacity, company, firm, or corporation, or agent, or attorney, shall fail, neglect, or refuse to return to the Assessor the schedule of property for taxation, the Assessor shall report the facts to the Chairman or Judge of the County Court, who shall cite the person, agent, or attorney, firm, officer, officers of the company or corporation before him, and shall demand of them to answer the questions heretofore provided in this act under oath, and shall have power to punish for contempt for failure to answer. And if the refusal to answer is persisted in, the Judge or Chairman shall make such an assessment in such case from the best information he can obtain, and such assessment shall be conclusive as to the value of the property and to the ownership of the property; and the costs accruing by proceedings under this section shall be paid by, and be a charge against, the tax-payer respectively, and upon the property.

* * *

SEC. 41. *Be it further enacted*, That the Assessors provided for in Sections 26 and 27 of this act shall, in conjunction with the Judge or Chairman of the County Court, appoint three freeholders, who, with said Assessor and Judge or Chairman of the County Court, shall constitute a Board of Equalization to examine said assessment lists as returned by the Assessor to the County Court Clerk.

SEC. 42. *Be it further enacted*, That said Board of Equalization shall carefully examine and compare and equalize said assessments, and shall eliminate from the lists thereof all property exempt under this act, and they are hereby empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive assessments when in their judgment justice demands it, and to correct any and all errors arising from clerical mistakes, or otherwise; and the corrections made, if any, shall be entered upon the assessment book, without in any way altering the assessment lists, and the action of this board as to valuation shall be final, and all complaints in this regard are hereby required to be made and acted upon by this board during its session, which shall be from the first Monday to the third Monday in June. If complaint made is based on excessive values, said board shall have the right to summon before them witnesses who shall be disinterested freeholders, and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such board may act.

* * *

SEC. 45. *Be it further enacted*, That said Board of Equalization shall make a return of the assessment lists and book, together with all changes made by said board, to the Clerk of the County Court, on or before the first Monday in July of the year for which said assessment is made, and then respectively their duties shall cease and determine.

General Statutes of Kentucky, page 1046, act of May 17, 1886:

The president or general manager of every telephone company, on the first day of July in each and every year, shall report to the Auditor the gross amount of the receipts, and shall pay to the Auditor one-fourth of one per cent. on the gross receipts of his company on all its business within this Commonwealth, in lieu of all other State tax; and the Auditor shall give and deliver his receipt of any and all taxes so paid.

HENRY B. MORROW, TRUSTEE, AND W. W. REDMAN, CONSTABLE, OF DAVIDSON COUNTY, TENNESSEE, APPELLANTS,

vs.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

STATEMENT.

This case comes by appeal from a decree in equity pronounced by the Circuit Court of the United States for the Middle District of Tennessee.

The bill was filed by the Cumberland Telephone & Telegraph Company to enjoin the appellants, who were collecting officers of the State of Tennessee, from selling the property of the Company for taxes.

The Cumberland Telephone & Telegraph Company (hereinafter called the Telephone Company) is a Kentucky corporation.[1] Its charter was taken out under the laws of that State in 1883.[2] The original incorporators were nine in number, only two of whom were citizens of Tennessee.[3]

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[1] Trans., 1, 13, 19. All references in this brief are to original, or side pages.

[2] Trans., 1, 13, 19.

[3] Trans., 14.

The Telephone Company does business and has "exchanges" in Indiana, Illinois, Kentucky, Mississippi, and Tennessee;[4] but the exchanges at Memphis (Shelby County) and Nashville (Davidson County), Tennessee, are the largest the Company has anywhere.[5]

This Company owns it poles, wires, exchange boards, easements or rights of way, but the telephone instruments it uses are the property of the American Bell Telephone Company of Massachusetts, and used under a lease.[6] The company has been doing a telephone business in Tennessee since 1883 but has never done so, or assumed to do so, *otherwise than as a Kentucky corporation.*[7]

For this privilege the Company pays a State privilege tax of fifty cents a year, on every telephone instrument in use.[8] The counties also have the right to impose a privilege tax of like amount.[8]

The Telephone Company has a capital stock of $1,148,000 in shares of $100 each,[9] which shares are owned and held by numerous citizens of Kentucky and other States.[1]

This being the situation, the tax *assessor* of Da-

[4] Trans., 2, 12.
[5] Trans., 12, 17.
[6] Trans., 12.
[7] Trans., 2, 19.
[8] Acts of Tennessee 1887, Ch. 1, p. 21.
[9] Trans., 2.
[1] Trans., 2; p. 13, q. 3.

vidson County, Tennessee, as it was his duty to do, assessed the Company's property for taxation for the year 1888. He assessed its poles, wires, *etc.*, in that county at $7,000, the tax thereon being $52.50.[2] He did *not* assess the *shares* of the capital stock to the Company at all.[3]

Under the laws of Tennessee the assessments made by the county *assessor* go from him to a Board of Equalization. The duties of this Board are as follows:

SEC. 42. *Be it further enacted*, That said Board of Equalization shall carefully examine and compare and equalize said assessments, and shall eliminate from the lists thereof all property exempt under this act, and they are hereby *empowered* to hear and adjust complaints from any party feeling aggrieved on account of *excessive* assessments, when in their judgment justice demands it, and to *correct* any and all *errors* arising from clerical mistakes or otherwise, and the corrections made, if any shall be entered upon the assessment book, without in any way altering the assessment lists, and the action of the board *as to valuation* shall be *final*, and all complaints in this regard are hereby required to be made and acted upon by this board during its session, which shall be from the first Monday to the third Monday in June. If complaint made is based on excessive values, said board shall have the right to summon before them witnesses who shall be disinterested freeholders, and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such board may act. (*Acts of Tenn.*, 1887, *Ch.* 2, § 42.)

The Company, having no complaint to make against the assessment made by the *assessor*, did not appear before the Board, and consequently the

[2] Trans , 2-3, 19.
[3] Trans , 2-3, 9.

Board approved it. But they did much *more* than this. At some time during their session they assumed to assess all these *shares* of the Telephone Company's stock for taxation; and they assessed these shares (for State and *county* purposes) *to the Company*, as the party bound to pay the same.[4] The form of the assessment as made by the Board was substantially as follows:[5]

Cumb. Tel. & Tel. Co., personalty	$ 52 50
Cumb. Tel. & Tel. Co., shareholders	5,168 25

The Company knew nothing of this extraordinary action of the Board until after it had adjourned, and all its powers ended.[6]

The Company paid the tax ($52.50) upon its property, but refused to pay the tax upon the *shares* of stock. Thereupon the appellant Henry B. Morrow, as Trustee (or collector) issued a "certified list"[7] of delinquent taxpayers to a constable named Redman. Mr. Redman seized and levied upon the poles, wires and instruments and "plant" of the Company.[8] Thereupon the Company filed this bill to enjoin a sale.

An injunction was granted, and on the final hearing made perpetual.

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[4] Trans., p. 3, 9.

[5] Trans., 3, 9.

[6] Trans., 3.

[7] This certified list is in effect an execution or distress warrant. *Acts of Tenn.*, 1887, *p.* 45, § 58.

[8] Trans., 4, 10.

But before the Trustee and the Constable answered, they moved to dismiss the bill upon the following grounds:

1. That as to the *State* tax, the suit was in effect a suit against the State.

2. That it was a suit against an officer of the State to reach the treasury and funds of the State —such suits being forbidden by the laws of Tennessee.

3. That it was a suit to enjoin the collection of a tax—such suits being also forbidden by the laws of Tennessee.

4. That as by Ch. 44 of the Acts of 1873 (of the Acts of Tennessee) the Company could pay under protest and sue in thirty days to recover the money, there was a plain, adequate, unembarrassed remedy at law.

5. That, independently of this statute of 1873, there was a plain, unembarrassed remedy at law because the Company could pay under protest and sue, there being no allegation of insolvency.[1]

The motion to dismiss was overruled and the defendants to the bill answered.

A witness introduced by the Company was asked on cross-examination to state the "*aggregate amount*" of stock owned by citizens of Tennessee, and the "*aggregate amount*" of stock owned by citizens of Kentucky on the 10th day of January, 1888[2] (the

[1] Trans., 10–11.
[2] Trans., 13–14.

date when assessments are to be made). He declined to answer, and the Court refused to compel him to answer.[3]

The cause was heard, and the injunction made perpetual. The defendants below appealed.

It will be observed that the Court below—

1. Refused to sustain a motion made to dismiss the bill for want of jurisdiction;

2. Refused to compel the Telephone Company's business manager to answer and disclose what was the "*aggregate amount*" of stock owned by residents of Tennessee, and also owned by residents of Kentucky, January 10, 1888;

3. Rendered a decree perpetually enjoining the collection of the tax complained of in the bill.

[3] Trans., p. 18.

ARGUMENT.

I.

The assessment in this case was wholly unauthorized and void.

The shares of stock held by citizens of Tennessee in this Company are taxable, but the shares held by citizens of other States are not. Although the shares held by citizens of Tennessee are taxable, they must be assessed to the owners, not to the Telephone Company; and be assessed in the district or ward where the individual owners reside.

As previously stated, the Telephone Company is a Kentucky corporation. It was chartered by that State, and has always had its principal office there.[8] All *stockholders'* meetings are held there.[9] The books are kept there, although duplicates are also kept at Nashville, Tennessee.[1] Of the nine original incorporators, only two were citizens of Tennessee.[2] It was organized in 1883, but in 1888 when this litigation arose, by reason of changes, the President and eight of the twelve directors were citizens of Tennessee.[3]

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[8] Trans., q. 5, p. 11.
[9] Trans., q. 7, p. 12; q. 2, p. 13.
[1] Trans., q. 6, p. 12; p. 17.
[2] Trans., q. 6, p. 14.
[3] Trans., p. 16.

The important fact is that this Company was created by the State of Kentucky. There are two modes of bringing corporations into existence. One is by special legislative charter. The other is by articles of incorporation taken out under general laws. But the corporation when organized is said to be organized under, that is created by, the laws of the State which granted the special charter or enacted the general corporation laws.

As a corporation is only an artificial creation of the law, in contemplation of the law it dwells only in the State which created it.

Street R. R. Co. vs. Morrow, 87 Tenn , 428.
Young vs. South Tredegar Iron Co., 85 Tenn., 189.
Ohio & M. R. R. Co. vs. Wheeler, 1 Black, 286.

In the brief of the learned counsel for the appellants there appears this statement:

There has never been a meeting of the board of directors in the State of Kentucky, but these meetings have been uniformly held in Nashville. The dividends on the stock, of course, are declared and paid in Nashville; the books are kept in Nashville, at the office of the Secretary, duplicates being also kept in Henderson; the shares of stock are transferred upon the books at Nashville, and upon the duplicate set kept at Henderson. With the exception of the formal meetings of stockholders to elect directors, the whole organization of the Company exists and performs its official acts within the State of Tennessee and under the authority of that State.[1]

This is inaccurate. In point of fact it appears that numerous meetings have been held in Kentucky,

[1] Brief, p. 20.

although for a lack of a quorum the meetings adjourned to Nashville where most of the Directors live.[5] There is no proof that any dividends have ever been declared or paid. Then too the evidence is that duplicate sets of *all* the books are kept at Hendersonville, Kentucky, and Nashville, Tennessee,[6] and that the Assistant Secretary, Mr. Myer, has charge at Hendersonville, of the *records*, books, etc., and the *business generally*.[7]

The contention of the learned counsel that the meetings of the *stockholders* (which are *always* held in Kentucky[8]) are mere "formal" affairs, and that because the *directors* meet in Tennessee, the "whole organization of the Company exists and performs its official acts within the State of Tennessee," is likewise most inaccurate. As previously shown a corporation, in contemplation of law, dwells in the State which created it, and for that reason the stockholders' meetings are not "formal" affairs. Stockholders' meetings must be held in the State which created the corporation, but directors' meetings may be held in any other State.

Taylor on Corporations, § 380, 381.
Cook Stock, Stockholders and Corporation Law, §§ 591, 592.

In the sense that when the Board of Directors perform an official act out of Kentucky, the Company as an organization or entity performs a cor-

[5] Trans., p. 16, q. 8.
[6] Trans., p. 16, q. 9.
[7] Trans., p. 17, q. 10.
[8] Trans., p. 12, qq. 7, 8; Trans., 13, q. 2.

porate act, the argument of the learned counsel for appellant is correct, but that is precisely what the Company *as a Kentucky corporation* has the right to do.[9] But in no sense can it be justly said that because an organized Kentucky company has "performed an official act," or done business in Tennessee, *therefore* the corporation has been *organized* under the laws of Tennessee. By this contention every railroad, bank, or other corporation whose *directors* may happen to meet in Tennessee, would be converted by such act into a Tennessee corporation.

The shares of stock in a corporation, being intangible and incorporeal personal property, may be given a *situs* for the purpose of taxation.

Street R. R. vs. Morrow, 87 Tenn., 428.
Tappan vs. Merchants' Nat'l Bank, 19 Wall., 499.

For the purpose of taxation the *situs* of shares is at the residence of the owner, unless otherwise provided by *statute.*

Ogden vs. City of St. Joseph, 90 Mo., 522; S. C., 16 Am. & Eng. Corp. Cas., 155.
Cooley on Taxation, 22.
Tappan vs. Merchants' Nat'l Bank, 19 Wall., 500.

It was within the power of *Kentucky* to make these shares taxable either where the corporation was located, or where the owners of the shares in Kentucky might reside.

Tappan vs. Merchants' Nat'l Bank, 19 Wall., 500.
McLaughlin vs. Chadwell, 8 Heisk. (Tenn.), 389.
Street Railroad Co. vs. Morrow, 87 Tenn., 428.

[9] Acts of Tenn., 1885, Ch. 66; p. 52 of Mr. Watson's brief.

It was perhaps also within the competency of Tennessee to compel foreign corporations (not engaged in interstate commerce) to submit to the taxation of their property or shares of stock by that State the same as domestic corporations, *as a condition to admission* to the State, for the purpose of doing business. But the determination of that question is immaterial, because Tennessee has not assumed to impose any such condition, save only upon mining and manufacturing corporations. It is the law of Tennessee that mining and manufacturing corporations chartered by other States shall file a copy of their charter articles with the Secretary of State, and comply with some other requirements, and this being done they shall be deemed and taken to be corporations of Tennessee, and be *taxable* as such.

Acts of Tenn., 1887, Ch. 31, § 2.
Code of Tenn., 1884, §§ 1994, 1998.

The assessment laws of the State provide that all the personal property of a tax-payer (and this includes "bonds, stocks, and other like securities") shall be taxed to the owner in the ward or district where he resides.

Acts of Tenn., 1887, Ch. 2, § 7, Snbsec. 5.

As a consequence the shares of stock in this Telephone Company held by citizens and residents of Tennessee would be taxable to *them*, but the tax *situs* is the ward or district where the owners reside.

While this is the *situs* of "bonds, stocks, and like securities" *in general*, there is one exception made by the same act. It provides that the shares of stocks in corporations organized under the laws of *Tennessee*, or of the *United States*, shall be assessed to the owners, in the ward or district where such corporations are *located*.

Acts of Tenn., 1887, Ch. 2, § 8.

Corporations organized under the laws of *Tennessee* and the *United States* are, by the express language of the statute, the *only* corporations whose shares are to be taxed where the corporation is located, and not where the owner resides.[4] *Expressio unius est exclusio alterius.*

Section 8 of the assessment law provides that the *share-holders* in every corporation "*organized* under the authority of *this* State, or of the United States," shall be taxed on the value of their shares.

Section 9 provides that the President of any "bank, banking association, or other corporation" *doing business under the laws* of this State shall declare upon oath the amount of capital invested in the business, and also state who his *partners* are, and that the shares shall be assessed to the *owner* in the ward or district where the business is located. It also provides that if the President have no partners all the shares should be assessed to the President as owner. It contains a similar provision as to the bonded *indebtedness* of the corporation.

[4] See Appendix to this brief for this Act.

Section 10 provides that a list of the share-holders subject to official inspection shall be kept in the office of *such* bank or other corporation "organized under the authority of *this* State or the United States," where the business is transacted.

Section 11 provides that when the owner of stock or bonds in any bank or other corporation "organized under the laws of *this* State or of the United States" shall not reside in the county or is a non-resident there shall exist a right of *attachment* to collect the taxes due from him on the shares or bonds.

Section 12 provides that it shall be the duty of the managing officer of every *such* bank or other corporation doing business in the State to retain out of dividends and interest a sufficiency to pay the tax assessed upon the shareholder, or bond-holder.

It will be observed that Section 8 is *the* Section which imposes the tax, and that it is expressly restricted to shares in, and bonds issued by, corporations *organized* under the laws of the *United States* or the State of *Tennessee*. Sections 9, 10, 11, and 12 prescribe the methods for collecting the tax imposed by Section eight.

True it is Section 9 provides that President or manager of any bank or other corporation "doing business" under the *laws of this State* shall declare on oath who his partners are, and the bonds and

capital of the concern, but the section must be read not alone but as part of a general system of taxation. What it obviously means is that the President of *such* corporations as are mentioned in Section 8 shall make the required oath. This is the language of Section 12. It provides that the President of every "*such*" corporation "doing business in the State" shall retain the tax out of interest and dividends.

In 1888 a somewhat similar question was considered by the Supreme Court of Tennessee. A street railroad company in Nashville had outstanding $132,000 of negotiable first-mortgage bonds. They were assessed *in solido* to "unknown owners," and as it was a dividend paying concern, the effort was made under the 12th Section of this act, to hold the street railroad company liable on the ground that it should retain the tax out of the *interest* payable to the bondholders. So far as bondholders were concerned the act was held to be void, but with respect to Section 9 the Court said that "seemingly" it applied to *all* corporations, but that in reality "it has no application to domestic corporations." The subject was dismissed with this remark:

> Just what *is* meant by this section it is unnecessary to say, further than that it has no application in our opinion to domestic corporations. (87 *Tenn.*, 423.)

Because the Court declined to say what the section *did* mean, but did express the opinion that it did not apply to *domestic* corporations, the learned

counsel for the appellant has jumped to the conclusion that it must apply to *foreign* corporations. This conclusion is, as we think, wholly unauthorized. The language of Section 9 is that the President of "*any* bank, banking association, or other corporation doing business *under the laws of this State*," shall make the required oath. No exception whatsoever is made. The Supreme Court of Tennessee conceded that "seemingly" it applied to *all* corporations.[5] Nevertheless they said it did not apply to domestic corporations. There is less justification for applying it to "foreign" State corporations, because this Section 9 is part of a tax system adopted to collect the tax on Tennessee and United States corporations alone. If Section 9 was to be cut loose (as it was by the decision) from the very class of corporations for which it was designed, upon what principle can it be made to lodge upon, and attach itself to, another and wholly different class?

If, however, this view should be altogether a mistaken one, and it should be now (and for the first time) held that Section 9 relates exclusively to corporations "doing business" in Tennessee, but existing by virtue of the laws of *other* States, the case of the Telephone Company is not weakened in the least, because this same Section 9, expressly provides that the shares and bonds which he is required on oath to expose, shall be assessed (not to the corporation, but) to the *holder or owner* as a

[5] 87 Tenn., 423.

part of "*his* taxable property."[6] ***There is not a line anywhere which says such shares and bonds shall be assessed to the corporation.***

The Act of 1887 provides that a list of the shareholders shall be kept for official inspection by all corporations "organized under the authority of *this* State or of the United States."[7] Section 11 provides that when the owner of stock in a corporation "organized under the laws of *this* State or of the United States" resides out of the county where the corporation is located, or is a non-resident of the State, the Collector may *attach* for the taxes. But the only corporations whose shares are required to be taxed where the corporation is located, are those organized under the laws of Tennessee and the United States. As a consequence *all* the shares in such corporations must be taxed, because their *situs* for taxation is fixed in Tennessee. But with respect to all other corporations the rule is different. The shares in those last-mentioned, are to be taxed where the *holder* or owner resides. If a resident of Tennessee happen to own stock in a Kentucky corporation it is to be taxed as his other personal property is taxed—where *he* resides.

Acts Tenn., 1887, Ch. 2, § 7.

But so far as the Kentucky *corporation* is concerned, and so far as the shares which are held by

[6] See Section 9, Appendix.
[7] Sec. 10. See Appendix.

non-residents of the State are concerned, as the law stands, they cannot be taxed in Tennessee.

Taylor on Corp., § 479.
Commonwealth vs. Standard Oil Co., 107 Penn. St., 119.

With respect to the shares held by citizens of Tennessee it is different.

II.

Even if the shares of this Kentucky corporation could be taxed by the State of Tennessee, they must be assessed to the owners, not to the Company; and this assessment being to the Company, is void.

The bill alleges that the shares of stock in the Company were assessed "to and against your *orator* for taxation and payment as the party bound therefor."[8] The answer admits it,[9] and it is shown that the warrant was issued against the *Company* and levied on its property direct.[1]

Even with respect to *Tennessee* corporations, and those organized under the laws of the United States, the law is that they are only conditionally liable for the tax upon the shares. When they are dividend-paying they must retain the tax out of the shareholder's dividend. They are under no obligation to pay the tax out of their own funds, and are liable *only* when dividends are declared

[8] Trans., p. 3.
[9] Trans., p. 9.
[1] Trans., 4, 9.

and paid over, without retaining the amount of the tax.

Street Railroad vs. Morrow, 87 Tenn., 406, 425.

Although the *duty* of retaining the tax is imposed on these corporations, it is imposed upon them as mere *agencies* of the taxing power, for the collection of the tax due from its *share-holders*—not from *themselves*. "The *shares* are the things taxed;" and as said by the Supreme Court of Tennessee in construing the same act: "From these provisions it is most obvious that the tax is *not* to be assessed against the *corporation*, but against the *share-holders* and bondholders *individually*."

Street Railroad Co. vs. Morrow, 87 Tenn., 424.

As a consequence the assessment of the *shares* of stock directly to domestic corporations and those organized under the laws of the United States, would be unauthorized and void. Much more so (if such a thing be possible) must the assessment be unauthorized when made directly to and against the corporation, where the shares so assessed to it are rightfully not taxable at all. Tennessee corporations and United States corporations (*i. e.*— National Banks) are the only corporations which are made tax collecting agencies, and required to retain dividends. No such duty is imposed upon corporations created by other States, and as a consequence the Telephone Company (being a Kentucky corporation) cannot under *any* circumstances be made liable for a tax imposed upon its shares.

Such shares as are held by Tennesseans are taxable, but that is a matter exclusively between the share-holder and the Assessor of his district. He is required to make oath in writing to what he has, and when he does so such shares as this Telephone stock are assessed to the owner *there*, where he resides.

Acts Tenn., 1887, Ch. 2, § 32; § 7.

It follows too from this that the Circuit Judge was correct in refusing to compel the Company to disclose the "aggregate amount" of stock held by residents of Tennessee, and the "aggregate amount" held by residents of Kentucky.[2] Under no circumstances could such "aggregates" be assessed to the Company.

It seems however that an assessment to the *Company* is to be sustained, notwithstanding the decision of the Supreme Court of Tennessee, upon the "special circumstances" of this case. The learned counsel for the appellant admits that the general rule requires that the assessment shall be made directly to the share-holders,[3] but says the rule is not "inflexible." He says:

> The bill does not allege that there are no resident stockholders, nor does it deny that the shares of stock assessed are owned by resident stockholders. In the entire *absence*, therefore, of any such *allegations*, the Court must *presume* that all the stock assessed belonged to *resident* stockholders, and, *further*, that these stockholders were residents of *Davidson* County, the place where

[2] Trans., 13–14; 18.
[3] Brief, p. 25–6.

the assessment was made. The property and the owners, then, were within the jurisdiction of the assessing officers; and the only question is whether the assessment of the property to the corporation can be sustained. (*Page* 25.)

He further says:

And in Section 34 of said act it is further provided that in all cases where any person or persons acting in a fiduciary capacity, company, firm, or corporation, or agent or attorney, shall fail, neglect, or *refuse* to return to the Assessor the schedule of property for taxation, the Assessor shall *report* the facts to the chairman or Judge of the County Court, who shall cite the person, agent or attorney, firm, officer, officers of the company or corporation before him, and shall *demand* of them to answer the questions in Section 31 of this act, under oath, and shall have power to punish for *contempt* for failure to answer. And if the refusal to answer is *persisted* in, the Judge or chairman shall make such an assessment in each case from the *best information he can obtain*, and such assessment shall be conclusive as to the value of the property and as to the *ownership* of the property.

These provisions are repeated in the act of 1887. (*See Appendix.*)

Now, here are enactments specifically authorizing and directing an assessment to be made of the shares of stock to the corporation. In the entire *absence* of any allegation or proof to the contrary, it must be *presumed* in favor of the action of the assessing officers, that they have taken *all* the steps necessary to *justify* an assessment of the shares of stock against the complainant *company*. And this legal *presumption* is strengthened by the fact that the complainant's general manager—its witness in this case—peremptorily *refuses* to give any information in regard to the shares of stock held by *residents* of Tennessee. (29.)

Finally he says:

The assessing officers have been compelled to get information as they could, and their action as to the ownership and value of

the property is final. Complainant, by its refusal to give the information upon which the assessment can be made, is estopped to question the regularity or legality of the decision made by the proper officers. It should not be allowed to take advantage of its own wrong. It does not assert or attempt to show that these resident share-holders have ever been assessed individually upon their shares of stock, or have ever paid a cent of taxes thereon. (31.)

This is an erroneous statement of both the law and the facts. The bill *does* allege that its "shares are held and owned by citizens of Kentucky and other States."[4] All that the appellants' answer claims is that a "large number" of the share-holders "live" in Tennessee.[5] They exhibited a list of share-holders which they claimed was a "correct" list of those residing in *Tennessee*, and it was proved that it was *not* a "correct" list—that is, that it contained the names of share-holders who did not reside in Tennessee.[6]

Then again it is neither pleaded in the answer nor shown by proof that the President or Manager of the Telephone Company ever was applied to for, or refused to give, a list of the stockholders. Upon the contrary the record shows that a "list" was exhibited to a witness on his examination, by the appellants.[7] Where did they get it? If *presumptions* are to be indulged they must have gotten it from some one who had a list. Finally it should

[4] Trans., p. 2.
[5] Trans., p. 9.
[6] Trans., q. 3, p. 13.
[7] Trans., q. 3, p. 13.

be said that the bill sets out with particularity *how* the assessment was made, and the answer *admits* that the assessment was made "as stated in the bill."[8] Consequently nothing is left to the *presumptions* so generously invoked by the appellants.

So far as appears there never was any refusal on the part of the Managers of this Company to answer any question, *prior* to the litigation. The Manager did refuse to answer a question (and was sustained by the Court) during the taking of proof; but this refusal, even if wrongful, can be no excuse for the form of a tax assessment made long *before* the litigation about the assessment arose.

But a most conclusive answer to this portion of the learned counsel's argument is that the very section (34) of the Act which is set out (on page 29 of the brief) confers the power to assess in cases of refusal upon the Chairman or Judge of the County Court alone; and it does not provide that even *he* shall assess the shares to the corporation. Upon the contrary he shall make it from the best information he can obtain, and if he makes it to the wrong owner nevertheless his assessment shall be conclusive.

But in construing this Act the Supreme Court of Tennessee has settled that the tax is *not* to be assessed against the corporation.

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[8] Trans., p. 9.

From these provisions—

Says that Court—

it is most obvious that the tax is *not* to be assessed against the corporation, but against the share-holders and bondholders individually.

Street R. R. Co. v. Morrow, 87 Tenn., 424.

III.

Even if the shares of the Telephone Company's capital stock can be taxed by the State of Tennessee, and even if the tax can be collected of the Company, this particular assessment is void because (A) *it was made by the Board of Equalization, and* (B) *because it was made in gross.*

It is stated by the learned counsel for the appellants in his brief (on page 25) that the Telephone Company does not contest the assessment because of "any irregularity in the mode of the assessment, nor upon any want of power in the assessing officers to make the assessment." This also is a mistake. The bill expressly alleges—

"That the board of equalizers, a board of officers for said county whose *duty* is to *equalize* assessments, *assumed* to and did * * * * assess said shares of stock;"

That this Board assessed these shares "to and against" the *Company*, instead of the share-holders;

That this Board assessed them in gross and not to the individual stockholders; and

That a distress warrant was issued against the *Company* and levied on its property. (*Trans., p.* 3, 4.)

(*A*) The Board of Equalization in Tennessee has (we submit) no power to *add* property to the tax lists which come before it for consideration.

The Assessor is required to furnish blanks to every citizen; and to assess the property in each district and ward separately.[9] He is then required to return the assessment books and lists to the County Clerk.[1]

Section 41 of this Act of 1887,[2] after designating the persons who shall constitute the Board of Equalization, provides that they

> shall constitute a Board of Equalization to *examine said assessment lists, as returned by the Assessor* to the County Court Clerk.[3]

The powers conferred on the Board to enable them to discharge this duty of examining the lists as returned, are to be found in Section 42 of the Act.[4] As will be seen, the power to add omitted property to the lists is not conferred, and as a consequence the power does not exist.

The rule is thus stated in Welty on Assessments:

> Boards of Equalization have only the powers conferred upon them by the Constitution or statute creating them. They have

[9] Act of 1887, §§ 31, 32.
[1] Act of 1887, § 36.
[2] See Appendix.
[3] Sec. 41, Appendix.
[4] Sec. 42, Appendix.

no power to add to an assessment property not included by the assessor, unless specially so authorized by the law creating them, as this would be to *make* an assessment, and not the act of equalizing one already made.

Welty on Assessments, 277–8.

The doctrine as stated by Mr. Welty is well supported.

Chamberlain v. Cleveland, 34 Ohio St., 551.
Manford v. Pleasant Grove Co., 42 Ind., 293.
Pacific R. R. Co. v. Cass Co., 53 Mo., 17.
1 Desty on Taxation, p. 591.

It must not be understood that omitted property rightfully taxable must escape taxation because of the absence of power in the Board of *Equalization* to assess it. Section 24 of the Assessment Act provides that the County *Trustee* shall have power at any time to assess omitted property, as well as property which has been inadequately assessed. It also provides that whenever any officer or even private person has knowledge of such a case, he *shall* bring the matter to the attention of the District Attorney who shall *cite* (*i. e.*—notify) the delinquent to appear before the Trustee, and the Trustee shall make the assessment if it shall appear to be a case proper for an assessment to be made.

Every person is entitled to notice either general or special of tax proceedings against him. A general *law* providing that the tax-payer at a stated fixed date shall have an opportunity to appear before a Board of Equalization, and make complaint against a wrongful assessment, has been deemed

sufficient notice of the time and place. But when a Board of *Equalization* is given power to *add* omitted property, it must be upon actual notice. The reason is obvious, as this case shows. Here the Telephone Company had no cause of complaint against the assessment as made by the Assessor and as returned upon his lists. Having nothing to complain of, there was no occasion for it to appear before the Board. It assumed, and correctly, that the *valuation* fixed by the Assessor would not be disturbed. Is it possible that under such circumstances the Company was obliged at its peril to keep an agent at the elbows of the Board of Equalization from the first Monday in June to the third Monday in June to see whether the Board would *add* something else to the lists? What the Board did was to *add* the share-holder's property to the Company's property, and assess it all to the Company. In short, they *added* A's property to the lists and assessed it to B. Obviously there is no way for a tax-payer to protect himself against such a proceeding, in the absence of special notice. They are as liable to do this thing at one time as another—at the very last moment of their session, as on the first day. It *may* not be done at all. It certainly ought not. As a consequence the general assessment *law* cannot operate as notice of such proceedings. For this reason no Board of *Equalization* can *add* property without actual notice.

Lehman vs. Robinson, 59 Ala., 219.
Overing vs. Foote, 65 N. Y., 264.

This particular assessment is void also because it was made in gross.

The assessment law of Tennessee provides that shares of stock in corporations created by Tennessee and the United States shall be assessed in the ward or district where the corporation is "located." But they are to be assessed to the *owners*, not to the corporation. The language of the act[6] is that "said shares of stock * * * shall be included in the valuation of personal property of such *stockholders* * * * whether they reside" in the ward or district where the corporation is located or not. The assessment of all the stock in gross, or in a block, would not be valid even as against the share-holders, much less as against the corporation. The reason is that such an assessment would make every share-holder liable for the tax on *all* the stock regardless of the ownership of the shares.

This assessment law provides for an assessment of the negotiable bonds issued by corporations, in the same manner as their stock is to be assessed. In the *Street Railroad Co. vs. Morrow*, 3 Pickle, 406 (a case arising under this assessment act), it appeared that the Street Railroad Company had outstanding $132,000 first mortgage bonds. The Trustee cited the Company to appear before him, and then proceeded to assess these bonds in a block to "unknown owners." The assessment was held

[6] See Section 8, Appendix.

void upon several grounds, but the Court also said with respect to this assessment:

> We are not to be understood as assenting to the validity of an assessment of a large lot of bonds owned by many *different* owners, as a block of $132,000 to "unknown owners." We waive the consideration of this question. (87 *Tenn.*, 430.)

The question arose in *First National Bank of Richmond vs. City of Richmond*, 39 Fed. Rep., 309. The Act of Congress permits the shares in National Banks to be taxed by the States. The City of Richmond assessed the shares of stock in the First National Bank of Richmond, and assessed them in a block to the Bank. The tax was held to be invalid upon various grounds; but with respect to the one now under consideration the Court said:

> Congress requires the tax to be assessed as part of the personal property of the *owners* of the shares of the stock. It does not authorize a tax upon the bank itself. The city has no power to assess a tax upon the bank *in solido*. (*Hughes, J., page* 313.)

One reason was that this mode of taxation gave no opportunity to the share-holder to deduct the debts he owed. A similar reason applies in Tennessee. The statute provides that the tax shall be assessed to the *owners* of the shares. In the case under consideration the shares were assessed *in solido* to the Telephone Company. By the Constitution of the State of Tennessee every tax-payer is entitled to an exemption of a thousand dollars worth of personal property,[5] and he can claim it

[5] Const. Tenn., Art. 2, Sec. 28.

against the taxation of shares of stock, as well as any thing else.[6] In a corporation having a capital stock consisting of 11,485 shares, it is possible for a large number of the holders to be so situated as to be entitled to interpose the thousand-dollar exemption. It would be impossible for this to be done as against an assessment of all the shares *in solido* to the company.

The Telephone Company is not seeking to evade its taxes. It has paid all which were rightfully assessed to it. What it seeks to do is to escape from an unauthorized and illegal claim in the guise of a "tax." The Telephone Company's position is—

1. That inasmuch as it is a Kentucky company, the laws of Tennessee have not imposed a tax upon the shares of its capital stock other than such as are owned by citizens of Tennessee;

2. That for the reason that it is not a *Tennessee* company nor a company created by the United States, it is not even a tax *agency*, and is neither required nor obliged to retain the taxes due from the *Tennessee* share-holders, out of the dividends payable to them, even when it appears that dividends are being paid;

3. That the shares held by Tennesseans only, are taxable, and they are to be assessed in the district or ward where the *holders* reside and not elsewhere;

4. That even if all the shares of the company

[6] 87 Tenn., 429.

are taxable, they must be assessed to the *holders*, and not to the Telephone Company; and,

5. That under no circumstances can they be taxed *in solido* to it;

6. That the Board of Equalization has no power to *add* property to the lists even if it has been inadvertently omitted; and certainly not to add it without due notice.

So far as appears in this case not a share is held in Tennessee. There is no direct evidence upon the point; and the allegation of the bill is that the stock is "held and owned by citizens of Kentucky and other States."[7]

If any one of the defences interposed by the Telephone Company is well taken the tax ought not to be enforced.

The only remaining question is whether the collection of the tax can be enjoined.

IV.

The Court below had jurisdiction, and was correct in refusing to sustain the motion to dismiss the bill.

It is true that a bill in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. But whenever special circumstances exist which bring the case under some

[7] Trans., p. 2.

recognized head of equity jurisdiction, such as a multiplicity of suits, or irreparable injury, or the like, the courts of equity entertain a bill to enjoin the collection of the tax.

Union Pacific Ry. vs. Cheyenne, 113 U. S., 516.
Lyon vs. Alley, 130 U. S., 187.
Dows vs. City of Chicago, 11 Wall., 109.

Such special and peculiar circumstances are both alleged and proven in this case.[9] The allegations of the bill are as follows:

Said property is of a very *peculiar* value, and its chief value consists in the *business* done; that its *business* will be *suspended* and injured in a way *not* capable of being estimated if the central "exchange board," or instruments or wires be seized by said defendant, and the business be suspended, as will be if he distrain. Moreover, the *public* will be irreparably injured as well. Many merchants, manufacturers, and business men of Nashville use your orator's property, and *rely* thereon in and for the carrying on of their business, and they will not only be greatly annoyed, but *seriously* interrupted and damaged by a seizure of your orator's property, and a closing up of the business, upon which, as stated, they are now *obliged* to, and *do*, rely. And your orator says that this interruption and suspension of business will also subject your orator to numerous damage *suits* on the part of its patrons and subscribers, and put it to great trouble and expense to defend the same; and *also* if it be made to pay said tax, the holders of shares of stock who reside in *other* States, and have never been citizens of Tennessee, will subject your orator to *numerous* and expensive *suits*, if it pays the same, and assumes to and does retain the same out of the dividends payable upon the said shares for its indemnity and reimbursement, as it will be obliged to do. (*Trans.*, 5.)

[9] Trans., 5, p. 13.

These allegations make the case clearly one for equitable relief.

Allen vs. Balt. & Ohio R. R. Co., 114 U. S., 311.
Cummings vs Merchants' Nat'l Bank of Toledo, 101 U. S., 153.
Union Pac. Ry. vs. Cheyenne, 113 U. S., 516.

It is insisted however that there are two statutes enacted by the *State* of Tennessee which operate to divest the Federal Courts of equity, of jurisdiction to enjoin the collection of taxes. One of these statutes provides that even if taxes claimed to be due the State are unjust, illegal, or unconstitutional, there shall be no remedy by injunction, but the tax must be *paid* under protest, and suit brought within thirty days to recover it.[1]

The other statute provides that no Court in Tennessee shall have jurisdiction to entertain a suit against the State, or against any officer of the State *acting by authority of the State*, with a view to *reach* the State, its treasury, funds, or property.[2]

Whatever may be the effect of these statutes upon the jurisdiction of the Courts of Tennessee, it has long been settled that such State statutes can in nowise affect, or limit the jurisdiction of the *equity* courts of the United States. The "adequate remedy at law" which is the test of equitable jurisdiction in these Courts, is that remedy which existed when the Judiciary Act of 1789 was adopted,

[1] Acts of Tenn., 1873, Ch. 44; Code 1884, §§ 926, 931; page 51 of Mr. Watson's brief.

[2] Acts of Tenn., 1873, Ch. 13; Code 1884, § 3507; page 51 of Mr. Watson's brief.

unless subsequently modified by Congress. This jurisdiction is the same that the High Court of Chancery in England possessed. It is *uniform* throughout the States of this Union, and can neither be limited nor restrained by *State* legislation. No change in *State* legislation giving a remedy, in like cases, by action at *law* can curtail the equity jurisdiction of the Courts of the United States.

Payne vs. Hook, 7 Wall., 430.
McConihay vs. Wright, 121 U. S., 206.
Robinson vs. Campbell, 3 Wheat., 212.
Rozer vs. Chapman, 119 U. S., 600.
Kirby vs. Lake Shore, etc., R. R., 120 U. S., 138.
Gamewell Fire-alarm Tel. Co vs. Mayor, etc. (N. Y.), 31 Fed. Rep., 312.
Curtis' Juris. U. S. Courts, p. 170.

It is true these pay-under-protest statutes have been several times sustained by the decision of this Court. In every instance however the question was whether a statute of this character *impaired the obligation of some contract.* They were all cases which originated in *State* courts, and in nowise involved the question of the jurisdiction of the *equity* courts of the United States. *State vs. Sneed*, 96 U. S., 69; *Keith vs. Clark*, 97 U. S., 454; *S. Carolina vs. Galliard*, 101 U. S., 433; *Antoni vs. Greenhow*, 107 U. S., 769; and *Moore vs. Greenhow*, 114 U. S., 338, were all cases from the Supreme Courts of Tennessee, Virginia and South Carolina, wherein the question was whether pay-under-protest statutes impaired the obligation of existing contracts; and it was held that they did not.

But whenever the question has been, whether these same statutes operated to *curtail* the *equity* jurisdiction of the Federal Courts, it has uniformly been held that they did not and could not; and for the obvious reason, that this jurisdiction could not remain *uniform* and as established by the Judiciary Act of 1789, if the various *States* could limit or restrain it.

Cummings vs. Merchants National Bank of Toledo.

101 U. S., 153.

In this case a bill was filed by a bank in the Circuit Court of the United States to enjoin the Treasurer of Lucas County, Ohio, from collecting an excessive and unequal tax which had been assessed upon its *shares* of stock held by the *share-holders*. The Court held that the statute of Ohio provided such a remedy; but it also held, that independently of the statute, the equity courts of the United States had jurisdiction upon these facts, in such cases.

Allen vs. Balt. & Ohio R. R. Company.

114 U. S., 311.

This was a bill in equity in the Federal Court by a Railroad Company to enjoin certain tax collectors in Virginia from levying upon and selling its cars for taxes. The bill admitted the tax to be due, but alleged that the Company had tendered

tax receivable Virginia *coupons* to the amount of the tax, in payment. The coupons were refused by the tax collectors under a statute of Virginia similar to that of Tennessee, and a distraint made. It was held that the jurisdiction of the Federal Court to grant the injunction, and the *propriety* of its exercise, was indisputable. (*P.* 317.)

The Tennessee (pay-under-protest) statute was passed in 1873.[3] The Virginia statute is a *copy* (but with some *additional* provisions) of the Tennessee statute, and was passed in 1882.[4] *Poindexter vs. Greenhow* was argued the day before *Allen vs. Balt. & O. R. R. Co.* was tried,[5] several of the attorneys being the same in both cases.[6] The opinion in *Poindexter vs. Greenhow* shows that the statute was interposed as a defence and the question fully considered.[7] Nevertheless, the statute was ignored, and the jurisdiction of the Court, and the propriety of its exercise, was declared in *Allen vs. B. & O. R. R. Co.* to be "indisputable."

Allen vs. Balt. & Ohio R. R. Co. (114 U. S., 311), has been repeatedly affirmed.

Hagood vs. Southern, 117 U. S., 71.
In re Ayers, 123 U. S., 500.
McGahey vs. Virginia, 135 U. S., 676.

[3] Acts of Tenn., 1873, Ch. 14.
[4] January 26, 1882. It is set out in full in 114 U. S., 275.
[5] 114 U. S., 269.
[6] 114 U. S., 269, 272, 311.
[7] 114 U. S., 300.

GAMEWELL FIRE-ALARM TEL. CO. VS. THE MAYOR.

31 Fed. Rep., 312.

This was a bill for infringement of letters patent. The laws of New York provided that all claims against the city of New York should be presented to the comptroller for adjustment before suit brought. This statute was interposed as a defence, but Wallace, J., held that it only applied to the State courts, and that the equity jurisdiction of the Federal Courts was uniform throughout the Union, and could neither be limited nor restrained by the State statute.

UNITED STATES EXPRESS CO. VS. ALLEN.

39 Fed. Rep., 713.

This was a bill in the Circuit Court of the United States for the Eastern District of Tennessee filed by the United States Express Company to enjoin the collection of a tax. This pay-under-protest statute was interposed as a defence, but Key, J., held that it was no defence to a suit in that Court.

The other Tennessee statute, namely:

No court in the State of Tennessee has, nor shall hereafter have any power, jurisdiction, or authority to entertain any suit against this State, or against any officer *acting by authority of the State*, with a view to *reach* the State, its treasury, funds, or property, and all such suits now pending, or hereafter brought, shall be dismissed as to the State, or such officers, on motion, plea, or demurrer of the law officer of the State, or counsel employed for the State,[8]

[8] Acts Tennessee, 1873, Ch. 13; Code, 1884, § 3507.

is as ineffectual, of course, to curtail the jurisdiction of Federal equity courts, as the pay-under-protest statute.

But there is an additional argument against this statute. The suit which it inhibits must be one brought against an officer *acting by authority of the State.* It is law in the State of Tennessee that an officer acting under an unconstitutional statute may be enjoined notwithstanding the statute, because there being no *valid* statute, the officer who assumes to execute it is not acting by "authority of the State."

Lynn vs. Polk, 8 Lea, 129.

It must follow that an officer acting where there is no law or statute at all, to say the least of it, can be in no better plight than one acting under an unconstitutional statute.

In *Poindexter vs. Greenhow* the Court says that whenever an officer who is sued for wrong-doing, seeks to substitute the State in his place, "in order to complete his defence, he must produce a *law* of the State, which constitutes his commission as its agent, and a warrant for his act." (114 *U. S.*, 288.)

This very language was quoted with approval in the case of *In re Ayers*, 123 U. S., 501.

The same principle was announced in *United States vs. Lee*, 106 U. S., 196.

Furthermore; the suit must be against an officer acting by authority of the State, to *reach* the State its funds or property.

The Code of Tennessee of 1858 provided that suit might be brought against the State under the same rules and regulations that govern actions between private persons. (§ 2807.)

This section of the Code was repealed in 1865 by a section of the act passed to defray the current expenses of the Thirty-fourth General Assembly of Tennessee.

In 1873, doubts were suggested as to the validity of this repealing clause, whereupon in order to "protect the State from suits and judgments," an act was passed which provided that no Court in the State of *Tennessee* should have jurisdiction to entertain any suit against the State, or against any officer of the State *acting by authority of the State*, with a view to *reach* the State, its treasury, funds, or property.[6] It also provided that all *pending* suits should be dismissed on the application of the law officer of the State.

Obviously this act was meant and intended to protect the State from judgments. To prevent all indirection, it also provided that when an officer was acting by *authority* of the State, no suit should be brought against *him* to *reach* the State, the

[6] Code, 1884, § 3507. Acts 1873, ch. 13. Page 51 of Mr. Watson's brief.

property of the State—that is, control the functions of government, or get hold of its funds or property.

There is no such effort here. This suit is not brought to *reach* the State, nor any thing the State has, but to prevent an officer of the State from "reaching" the complainant. If he were acting by *authority* of the State, *this* case would not be within the statute.

It is to be remembered in this connection that the Tennessee statute has no relation to *county* taxes.

City of Nashville vs. Smith, 86 Tenn., 217.

The taxes complained of in the bill are partly county taxes.[7]

Under the Constitution of the United States the State of Tennessee is not liable to suit against her consent. This inhibition is not confined to a court of equity. It is effective as a prohibition in all Courts, law and equity, State and Federal alike.

We also concede that a suit against an *officer* of the State to "reach" the *State*, is as effectively prohibited as is a suit directly against the State itself. Just when a suit against an officer is to be deemed in substance and effect a suit against the State has been a perplexing question to the Courts.

The position of the appellants with respect to

[7] Trans., 2, 3.

the question is thus stated by their counsel, Mr. Watson, in his brief:

> However *wrongful* may be the action of the State's officers, resulting from an *erroneous construction* of their authority under the State statute, yet if that *statute* does not conflict with the Constitution or laws of the United States, the *officer's act* is still *the act of the State*, and he will not be subject to suit. (*Page* 25.)
>
> * * * * *
>
> The wrong complained of is in the action of the *assessing officers*, and this, not upon the ground that they were acting under a *void* statute, but that they had made a *mistake* in assessing to *complainant* property not belonging to *it*. In this matter they were certainly acting as State officers, and not as individuals. (*Page* 25.)
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> * * * * *
>
> It is not pretended that the statute under which the assessment was made is in conflict with the Constitution or laws of the United States. It is a valid law, and furnished complete authority to the assessing officers in rendering their decision in the matter of the assessment. Assuming that they have committed *errors* in the performance of their duties, they were the *errors* of *agents* of the State, and not of individuals acting upon their own responsibility. (*Page* 44.)

Undoubtedly the officers who made the assessment, did it officially. They certainly *assumed* to act as officers, and not as individuals. It is only as officers that they have authority to act at all. But it by no means follows that an act done under color of official authority is for that reason the act of the government—the act of Authority itself. If this were so, there could be no such thing as official wrong. For the act of an officer to be the act of the State, there must be *law* which warrants the act.

Poindexter vs. Greenhow, 114 U. S., 288.

The contention of the Telephone Company is, not as stated by Mr. Watson that the Assessors made a "*mistake* in assessing to complainant property not belonging to it," but that they assessed *shares* of stock which they *knew belonged to the stockholders*, to the Company; that they did this in violation of law; that they never had *power* or authority to *assess* anybody's omitted property; and that the form and mode of the assessment was lawless and unauthorized.

In fine, the Company's contention is that the *law* which is the Board's commission to act, gave no warrant for this so-called "official" act.

The officers sued as defendants are the tax collector and a constable — both purely *ministerial* officers.

Can it be, and has it ever been, that if a ministerial officer who is about to execute wrongful process against the property of a citizen, the latter can maintain no action to restrain that officer, forasmuch as he assumes to be acting as an *officer* of the State?

Suppose the State of Tennessee were to obtain judgment against one of her citizens, without notice or service of process, and an execution, regular on its face in every respect, were to come to a Sheriff's hands. It is quite clear that the writ would be

full protection to the Sheriff as to suits against him personally for damages.

Perdue vs. Dood, 1 Lea (Tenn.), 710.
Crockett vs. Latimer, 1 Hum. (Tenn.), 273.
1 Freeman on Executions, § 101.

It is equally plain that the Sheriff could be enjoined by the defendant in the execution, *if* the plaintiff were a private individual; and we think it to be equally plain that he can be enjoined where the State is the plaintiff (as in the case supposed), although the Sheriff is assuming to act only in his official capacity and although the State is the plaintiff in the writ.

A suit cannot be brought against a State without its consent.

A suit cannot be brought against an officer of the State, upon, or to enforce, or to cause the enforcement of, a contractual obligation of the State.

In re Ayers, 123 U. S., 443.
Hagood vs. Southern, 117 U. S., 552.
Louisiana vs. Jumel, 107 U. S., 711.
Mechem on Pub. Officers, § 836.

A suit cannot be brought against an officer of the State of Tennessee, "acting by authority of the State," (that is, when he is doing that which *law* warrants) to reach, or get hold of, the funds, property, or treasury of that State.

Acts of Tenn., 1873, Ch. 13.
Code of Tenn. (1884), § 3507.
Lynn vs. Polk, 8 Lea (Tenn.), 121.

Subject to these limitations suits may be brought against State officers in their official capacity whenever the plaintiff's *right* has been violated, and an *act* has been done, or is about to be done, in which he has a legal interest, especially when they are mere ministerial officers.

In re Ayers, 123 U. S., 506.

As a result of all the Virginia coupon cases this Court said in *McGahey vs. Virginia* that any Virginia tax-payer who tendered coupons in payment of taxes and held himself in readiness to make the tender good by payment, could enjoin the officers of Virginia (in cases of irremediable injury), from seizing his property for the taxes. (135 *U. S.*, 684.) The principle thus enounced is, that an action against an officer of a State to restrain him from collecting an illegal tax, is not a suit against a State.

We respectfully submit that the decree of the Circuit Court should be affirmed.

JOHN J. VERTREES,
WILLIAM O. VERTREES,
Solicitors and Counsel for the Appellee.

APPENDIX.

The act contains 85 sections, and only so much as is material is appended.

CHAPTER 2

Of Acts of Tennessee, 1887.

AN ACT to provide more just and equitable laws for the assessment and collection of revenue for State, county, and municipal purposes, and to repeal all laws now in force whereby revenue is collected from the assessment of real estate, personal property, privileges, and polls.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That all property, real, personal, and mixed, shall be assessed for taxation for State, county, and municipal purposes, except such as is declared exempt in the next section.

Sec. 2. *Be it further enacted*, That the property herein enumerated, and none other, shall be exempt from *ad valorem* taxation:

* * * * *

7. Personal property to the amount of one thousand dollars.

* * * * *

Sec. 4. *Be it further enacted*, That the basis of all assessments shall be as follows, to wit:

1. To assess the property to the person or persons owning or claiming to own the same on the tenth day of January of the year for which the assessment is made, if known; if not, to the unknown owners.

2. To assess real estate at its cash value, to be ascertained as hereinafter provided.

3. To assess personal and mixed property at its cash valuation.

4. To assess the property, including property held by executors, administrators, trustees, and guardians, in the district or

ward in which it lies, or is known to be at the time of assessment; but all stock in banks, banking associations, or other corporations or joint stock companies, shall be assessed in the place, town, ward, or district in which such banks, banking associations, or other corporation are located, at its full market value; but in no instance shall the stock of any bank or banking, insurance, or other stock company or corporation, be assessed for less than its actual value and net surplus, if any. Street railroad stock and bonds, and property of a street-car company used within any town, city, or taxing district, where the office of the company is located outside of such incorporated city or town, or a taxing district, but the main line of the road is within the city, shall be taxed in the city, town, or taxing district as if the office were situated within the city limits.

* * * * *

SEC. 7. *Be it further enacted*, That personal property shall be assessed under the following heads:

1. The actual *stock* in each bank, or banking, insurance, or other stock company or *corporation* invested in business.

2. Stocks of merchandise, wares, goods, and chattels kept on hand or in store for sale, trade, or traffic; but the value of same shall not be included in the tax values, and the Assessor is hereby required to furnish a list of same, showing the owners and value of said stock, to the County Court Clerk, which shall be recorded in a book kept by him for that purpose.

3. Merchandise, wares, goods, and chattels sold at auction or on commission.

4. Notes, due-bills, negotiable paper, and accounts on solvent persons, or parties believed to be solvent, and all other assets, including cash on hand or on deposit, or invested in any manner in this State or elsewhere.

5. All *bonds, stocks, and other like securities* other than such as are exempt from taxation by the laws of the United States.

6. Stallions, mares, geldings, jacks, jennets, mules, cattle, sheep, and hogs, and all blooded stock, to be assessed at actual cash value.

7. Watches, plate, jewelry, pianos, and household and kitchen furniture.

8. Carriages, buggies, and all other wheeled vehicles of pleasure or profit.

9. Machinery, engines, presses, looms, steam-boats, ferry-boats, and tools and implements of all pursuits and industry for gain or profit.

10. All other personal property, whether belonging to individuals, corporations, or firms.

11. The amount of income derived from United States bonds, and all other stocks and bonds not taxed *ad valorem*.

SEC. 8. *Be it further enacted*, That no tax shall hereafter be assessed upon the capital of any bank or banking association, or any other joint stock company or corporation organized under the authority of *this State* or of the *United States;* but the *stockholders* and bondholders in *such* bank or banking association, or other corporation, shall be assessed and taxed on the market value of *their* shares of stock and bonds therein; said shares of stock and bonds shall be included in the valuation of personal property of such *stockholders* or bondholders in the assessment of State, county, or municipal taxes at the place, town, ward, or district where such bank or banking association, or other corporation, is located (except otherwise provided by law), whether said stockholder or bondholder resides in said place, town, ward, or district, or not; and all banks or banking associations, or other corporations, shall, in addition, be liable for taxes on any property, funds, or assets owned by them not included in the foregoing provisions of this section; and the property and shares of stock in companies or corporations organized under the laws of the State of Tennessee, and firm or firms engaged in manufacturing articles of the produce of this State exclusively, shall be assessed as one property, in the same manner as the property of firms and individuals is assessed.

SEC. 9. *Be it further enacted*, That the president or business manager of any bank, banking association, or other corporation doing business under the *laws of this State*, is hereby required to declare upon oath before the Assessor, the amount of capital invested in such business, and the amount of bonded indebtedness, if any, outstanding against the same, and each one hundred dollars of such capital and bonded indebtedness, for the

purpose of this act, and for the purpose of taxation, shall be held and regarded as one individual share in such bank, banking association, or other corporation, and such shares are hereby declared to be personal property. If such president or business manager have partners, he shall declare upon oath before the Assessor the number of shares held or owned by each of them in such business, ascertained as above provided, and the shares so held by any partner shall be included in the valuation of *his* taxable property in the assessment of all taxes levied in the city, town, ward, or civil district where such business is located, except herein otherwise provided; and said president or business manager shall pay the same, and make the amount so paid a charge in *his* account with said partners; and if said president or business manager have *no* partners, *he* shall be held to be the sole owner of all the shares in said business, and the same shall be included in the valuation of *his* personal property in the assessment of all taxes levied in city, town, ward, or district where said business is located, except herein otherwise provided.

SEC. 10. *Be it further enacted*, That there shall be kept at all times in the office where the business of *such* bank, banking association, or other corporation, organized under the authority of *this State*, or of the *United States*, shall be transacted, a full and correct list of the names and residences of all the stockholders and bondholders therein, and the number of shares and the amount of bonds held by each, and such list shall be subject to the inspection of the officers authorized to assess taxes, during the business hours of each day on which business may be legally transacted.

SEC. 11. *Be it further enacted*, That when the owner of stock or bonds in any bank, or banking association, or other corporation organized under the laws of *this State*, or of the *United States*, shall not reside in the same county where the bank or corporation is located, or is a non-resident of this State, the revenue collector for the State, county, or municipality shall respectively have the power to collect the tax assessed by this act, by instituting *attachment* proceedings, and said tax shall be and remain a lien on the stocks or bonds until the payment of the same.

SEC. 12. *Be it further enacted*, That for the purpose of collecting such taxes, and in addition to any other laws of this State relative to the imposition and collection of taxes, it shall be the duty of the President or managing officer of every *such* bank or other corporation doing business in the State, to *retain* so much of any dividend or interest belonging to such stockholder or bondholder as may be necessary to pay any and all taxes assessed in pursuance of this act, until it shall be made to appear to such officers that said taxes have been paid.

* * * * *

SEC. 24. *Be it further enacted*, That should it at any time after the assessments have been made, come to the knowledge of the Chairman or Judge of the County Court, the Clerk of the County Court, the County Trustee, Sheriff, or *other* officer or person of any county in this State, that *any* person, company, firm, or corporation in said county has *not been assessed* as contemplated by the provisions of this act, or has been assessed on an inadequate amount, it shall be the duty of said Chairman, or Judge, Clerk, Trustee, Sheriff, or other officer or person, on motion of Attorney-general, to *cite* said person, company, firm, or corporation, their agent, attorney, or representative, to appear before the Trustee for the purpose of being assessed according to law; and said *Trustee* is hereby authorized and empowered to make the proper assessment against such person, firm, or corporation; and should it appear that said person, company, firm, or corporation did, in any manner, connive at or purposely evade said assessment, or did knowingly permit an inadequate assessment to be made, said Trustee shall correct said assessment, and shall add fifty per cent. to the amount of said assessment, and cause the same to be entered upon the tax-books for collection. And the Attorney-general shall be allowed, as compensation for his services, *twenty per cent.* of the taxes or penalty realized from said increased assessment, to be retained out of the taxes when collected.

* * * * *

SEC. 32. *Be it further enacted*, That the Assessor shall furnish every person, company, firm, or corporation in each ward and district, proper blanks for the purpose of listing and assessing

all property and polls; and it is hereby made the duty of the Comptroller of the Treasury to furnish the Clerks of the County Courts said blanks, to be distributed by the Clerk to the Assessor, which shall contain among others necessary to ascertain all taxable property, the following questions, and the Assessor shall require all parties liable either for a property or poll-tax to fill out separate lists:

1. How many acres of land do you own? In what civil district, range, or Surveyor's district is it located, and by whose land is it bounded on the east, south, west, and north?

2. How many town lots do you own? What is their number, and in what town located? What is the number of front feet and depth of the lot?

3. What is your age? Is there any reason why you are not liable for poll-tax?

4. What does your personal property consist in, and where situated? Have you conveyed, converted, or disposed of any property, personal, real, or mixed, in any manner, or created any debt for the purpose of evading the provisions of law or affecting the value and amount of your taxable estate?

5. Are you engaged in any banking business, or are you a *share-holder*, or bondholder, or engaged in, or the officer of any incorporated bank or other *corporation?* If so, *state the number of shares and bonds held by you* and other share-holders or bondholders in said business. And the Assessor shall require *oath* to be made to the correctness of the items thereof, and the questions thereon, which oath shall be administered by the Assessor (who is hereby authorized to administer same), or some Justice of the Peace, and entered thereon beneath said *list*, and signed and sworn to by the party *listing*. And nothing in this act shall be so construed as requiring the property-holder to make oath as to the value of any of his property, but the Assessor is hereby required to assess and fix the value of all property as herein required, and report all persons violating this act to the grand jury.

* * * * *

SEC. 35. *Be it further enacted*, That in all cases where any person or persons acting in a fiduciary capacity, company, firm,

or corporation, or agent, or attorney, shall fail, neglect, or refuse to return to the Assessor the schedule of property for taxation, the Assessor shall report the facts to the Chairman or Judge of the *County Court*, who shall cite the person, agent, or attorney, firm, officer, officers of the company or corporation before him, and shall demand of them to answer the questions heretofore provided in this act under oath, and shall have power to punish for contempt for failure to answer. And if the refusal to answer is persisted in, the *Judge or Chairman* shall make such an assessment in such case from the *best information he can obtain*, and such assessment shall be conclusive as to the *value* of the property and to the *ownership* of the property; and the costs accruing by proceedings under this section shall be paid by, and be a charge against, the tax-payer respectively, and upon the property.

SEC. 36. *Be it further enacted*, That the Assessor shall make a report to the County Court Clerk of said *assessment lists*, by the first Monday of June of each year, and turn over his books to said Clerk, which shall be filed by him and carefully preserved, to be acted upon by the *Board of Equalization* to be appointed as hereinafter provided; and said books and lists are to be preserved as a part of the official records of the office of said Clerk, accompanied by the following oath, made before the Judge or Chairman of the County Court, and said oath shall be filed in the office of County Court Clerk:

* * * * *

SEC. 41. *Be it further enacted*, That the Assessors provided for in Sections 26 and 27 of this act shall, in conjunction with the Judge or Chairman of the County Court, appoint three freeholders, who, with said Assessor and Judge or Chairman of the County Court, shall constitute a Board of Equalization to examine said *assessment lists as returned by the Assessor* to the County Court Clerk.

SEC. 42. *Be it further enacted*, That said Board of Equalization shall carefully examine and compare and equalize *said assessments*, and shall eliminate from the lists thereof all property exempt under this act, and they are hereby empowered to hear

and adjust complaints from any party feeling aggrieved on account of excessive assessments when in their judgment justice demands it, and to correct any and all *errors* arising from clerical mistakes, or otherwise, and the corrections made, if any, shall be entered upon the assessment book, without in any way altering the assessment lists, and the action of this board as to valuation shall be final, and all complaints in this regard are hereby required to be made and acted upon by this board during its session, which shall be from the *first* Monday to the *third* Monday in *June*. If complaint made is based on excessive values, said board shall have the right to summon before them witnesses who shall be disinterested freeholders, and the sworn testimony of three such witnesses concerning the same will be sufficient evidence upon which such board may act.

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SEC. 44. *Be it further enacted*, That each member of said Board of Equalization, before entering upon the duties of their office, shall take and subscribe to the following oath before the Clerk of the County Court, which shall be filed in said office:

"State of Tennessee, —— County. I, ————————, member of the Board of Equalization of Assessments in said county, do hereby solemnly swear that I will, without fear, favor, or affection, perform the duties required of me by law as a member of such board, and that I will carefully examine, compare, and equalize *all assessment lists as returned by the Assessor and his deputies*, in strict compliance with the requirements of this act as to *value*, and that I will hear all *complaints* made before said board, by parties feeling aggrieved, during the sitting of the same, and act impartially in passing thereon to the best of my knowledge and ability; so help me God. Sworn to before me this —— day of ———, 18—."

SEC. 45. *Be it further enacted*, That said Board of Equalization shall make a return of the assessment lists and books, together with all changes made by said board, to the Clerk of the County Court, on or before the first Monday in July of the year for which said assessment is made, and then respectively their duties shall cease and determine.

SEC. 46. *Be it further enacted*, That should the property in any district or ward, or any part thereof, *escape* assessment, or *fail* in any manner to be assessed, the *Trustee* is hereby required to *assess* the same, and report the amount of taxes thereon collected to the County Court as "picked up" taxes at the same time that he reports lists of errors, etc.; and the Clerk of said court is hereby required to certify a copy of said report to the officers with whom the Trustee, by law, is required to settle, and the Trustee shall account for the same in making final settlements of his various accounts.

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Passed March 25, 1887.
Approved March 26, 1887.

CHAPTER XXXI.

ACTS OF 1877.

AN ACT to declare the terms on which foreign corporations organized for *mining* or *manufacturing* purposes may carry on their business, and purchase, hold, and convey real and personal property in this State.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That corporations chartered or organized under the laws of other States or countries, for the purpose of mining ores or coals, or of quarrying stones or minerals, of transporting the same, or erecting, purchasing, or carrying on works for the manufacture of metals, or of any articles made of or from metal, timber, cotton, or wool, or of building dwelling-houses for their workmen and others, or gas-works, or water-works, or other appliances designed for the promotion of health, good order, or general utility, in connection with such mines, manufactories, and dwelling-houses, may become incorporated in this State, and may carry on in this State the business authorized by their respective charters, or the articles under which they are or may be organized, and may enjoy the rights and to do the things

therein specified, upon the terms and conditions, and in the manner and under the limitation herein declared.

* * * * *

SEC. 3. *Be it further enacted*, That such corporations shall be deemed and taken to be corporations of this State, and shall be subject to the jurisdictions of the Courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this State.

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SEC. 5. *Be it further enacted*, * * * * * The said corporations shall be liable to taxation in all respects the same as natural persons resident in this State, and the property of its citizens is or may be liable to taxation; but to no higher taxation, nor to any other mode of valuation, for the purpose of taxation; and the said corporations shall be entitled to all such exemptions from taxation which are now or may be hereafter granted to citizens or corporations for the purpose of encouraging manufactures in this State, or otherwise.